Hollinger Corp.
pH 8.5

THE

STATE OF DAKOTA:

HOW IT MAY BE FORMED.

Replies to the Pamphlet of Hon. Hugh J. Campbell, U. S. Attorney of Dakota, treating upon the above subject.

OPINIONS OF COURTS, JURISTS AND STATESMEN, AS TO THE ADMISSION OF NEW STATES INTO THE UNION.

—BY—

P. C. SHANNON,

Ex-Chief Justice of the Supreme Court of Dakota Territory.

YANKTON, D. T.
HERALD PRINTING HOUSE.
1883.

INTRODUCTORY.

The following articles from the pen of Ex-Chief Justice P. C. Shannon are reprinted from the columns of the Dakota HERALD, in response to a repeated demand for their production in a more substantial and convenient form. With one exception these articles were originally published in August and September last, before and during the Sioux Falls convention called to frame a Constitution for the proposed State. The points discussed with so much ability and clearness are of such importance as to command not only fresh perusal but preservation for future use. The editors of the HERALD feel, therefore, that they are doing valuable service to the public in rescuing these able and interesting letters from the columns of a newspaper, and presenting them in pamphlet form.

EDITORS OF THE DAKOTA HERALD.

THE STATE OF DAKOTA:

How it may be Formed from the Territory.

PART I.

It was only recently that I came into possession of a pamphlet from the pen of Hon. Hugh J. Campbell, U. S. Attorney for Dakota Territory, treating upon the above subject; and it is proper to say that I have perused it with deep interest. All such contributions at the present time must necessarily prove of great value to the people in their endeavors properly to reach the end sought. The discussion should present all attainable facts, opinions and decisions, and should be conducted in no party or factional spirit. It should be free from all acrimony, and should be solely directed toward calm, candid and impartial investigation. In this spirit I proceed to present the following compilations and observations:

The pamphlet has an "Introductory," which, although written by another, must be conceded to be at least *quasi* authentic. It states that "these articles contain all the known authorities upon the subject, compiled and commented upon at length," etc., etc.

I must be excused for saying, in the most respectful manner, that there are some other authorities, and some different opinions, which seem to have escaped the notice of the author. It is best to look at these squarely, although they may not chime in with our desires or aspirations, so that we may have a "well guarded" prevision of what may be urged against us in the next Congress. For, assuredly, there are many senators and members of Congress who are perfectly familiar with what I am about to quote.

The Territory, it is conceded, should be divided on the 46th par-

of the people in the House, when assembled at Washington, may delay or refuse assent to the programme. What then? Treat the organic law of the Territory as if it did not exist! Fling aside the Territorial government existing under that organic act, which *is* the lawful *Constitution* of the Territory!! Set up a government of our own, elect State officers, legislate for ourselves, provide our own courts and collect taxes!! And teach the people that all this is legal and right, and that any adverse action on the part of Congress in refusing admission would not take from us the privilege of governing ourselves! History teaches by example, and it abounds in bad ones. Michigan, and Rhode Island under the Dorr constitution, are instances, furnishing very bad examples, which, in the year 1883, ought not to be praised or followed. One who, in arguing, jumps at conclusions, should remember Bacon's advice —"a man leapeth better with weights in his hands than without."

But, after all, the conclusions in the pamphlet are only the opinions of one lawyer, whose mind is fixed on a favorite idea, in pursuing which he appears to have overlooked all adverse views. If the opinion of an equally good lawyer who is familiar with all the authorities, statutes and facts, can be adduced to the contrary, then the potency of the pamphlet is shaken, if not destroyed.

Therefore, let us call Judge Thomas M. Cooley to the stand. This gentleman is known as "one of the Justices of the Supreme Court of Michigan, and Jay professor of law in the University of Michigan." He is the author of a great work named "A Treatise on Constitutional Limitations," a book quoted everywhere by the highest courts.

It is to be fairly presumed that Judge Cooley of Michigan knows as much about the history of his State as any of us here knows, and that he is perfectly familiar with the mode by which Michigan arrived at statehood. (These things are important because the pamphlet holds aloft the model of Michigan as the one to be imitated by "the State of Dakota." Indeed the strength of the pamphlet is shorn, if we cut from it the dazzling example of Michigan, and the Michigan case of Scott vs the Detroit Young Men's Society—a case which, meteor-like, flames lawless through the judicial sky.)

This justly renowned writer and professor of law, in his book on Constitutional Limitations, 4th edition, 1878, pages 38 and 39, with full knowledge of what had been done in Michigan and Tennessee, and with the above named case of the Young Men's Society before him (the reasoning of which he styles *plausible*)—with an equal knowledge of Chief Justice Taney's opinion in the Dred Scott case, after full examination of the entire subject, and after studying the legislation of Congress by which all the Territories have become States, together with all the local antecedent steps, speaks as follows:

"In regard to the formation and amendment of State constitutions, "the following appear to be settled principles of American constitutional "law:

"The people of the several Territories may form for themselves "State constitutions, *whenever enabling acts for that purpose are "passed by Congress*, but only in the manner allowed by such enabling "acts, and through the action of such persons as the enabling act shall "clothe with the elective franchise to that end.

"If the people of a Territory shall, of their own motion, without "such enabling act, meet in convention, frame and adopt a Constitution "and demand admission to the Union under it, *such action does not "entitle them, as matter of right, to be recognized as a State;* but "the power that can admit can also refuse, *and the Territorial status "must be continued* until Congress shall be satisfied to suffer the Terri- "tory to become a State.

"There are always in these cases questions of policy as well as of "constitutional law to be determined by the Congress before admission "becomes a matter of right—whether the constitution formed is Repub- "lican, *whether suitable and proper State boundaries have been "fixed upon;* whether the population is sufficient; whether the proper "qualifications for the exercise of the elective franchise have been "agreed to; whether any inveterate evil exists in the Territory which "is now subject to control, but which might be perpetuated under a State "government;—these and the like questions, in which the *whole coun- "try is interested*, cannot be finally solved by the people of the Terri- "tory for themselves, but the final decision must rest with Congress, "and the judgment must be favorable before admission can be claimed "or expected."

So much from Judge Cooley. And is it not rather singular that, in "the close investigation" made by a lawyer evidently smitten by the beauty of the Michigan example—the views of so illustrious a citizen of Michigan should have been passed by without the slightest notice? It is observable that according to Judge Cooley's best judgment, the principles he enunciates are settled principles of constitutional law. He writes with calmness and deliberation, free from the impulses and passions which seem to agitate many minds in Dakota. His warning voice is thus raised against the impetuous teachings of the pamphlet. It is the voice of a sage pleading for order and legitimate action. It may have no effect here; but who can state the number of his followers in the next Congress?

Attention is particularly called to the question of boundaries. In legislating for the interests of the whole country Congress is to determine what shall be the proper boundaries for the new State. What shall be its size? Have not the people of the States a voice in this matter? It is quite evident that the question of dimensions is a question of policy affecting all the States, and not determinable in the pres-

ent case by any constitutional rule. But my purpose is not so much to give my own opinions as to furnish those of others.

If Judge Cooley's propositions need backing let us look a little further. Let us examine the decisions of the Supreme Court of a neighboring State. There is a case in Nebraska which has also been overlooked, and which supplies some useful information. I refer to the case of Brittle vs. The People, in the Nebraska Reports, vol. 2, page 198. The opinion of the majority of the court is by Judge Crounse, in which he gives the history of the formation and adoption of the constitution of that State, and declares that the matter of admitting States is purely a political question, and that the power is solely vested in Congress. The following quotations from this opinion are very apposite to the subject—and in giving them liberty has been taken to italicize certain parts, a liberty which will be taken throughout when deemed proper to draw attention.

Says Judge Crounse:

"Congress, under the Constitution, is charged with the duty of "making all needful rules and regulations respecting the territory of the "United States. It has given to Nebraska a Territorial form of gov- "ernment. *A State and Territorial government could not possibly* "*exist at one and the same time.* This is seen by the fact that, until "our admission, the Territorial government continued *in full force*, "notwithstanding the vote of June, 1866. What we choose to call a "State constitution was, at most, a proposed instrument, and *of no* "*more force until admission than blank parchment*. Those who "had been chosen as *State officers had no offices to fill, and were mere* "*private citizens, governed by the laws and officers of the Territory.* "It was Congress alone that could admit the State."

And again:

"The Legislature of the Territory owes its existence to the organic "act of Congress, passed in 1854, which empowers it to legislate on all "rightful subjects of legislation. To undertake *to subvert the very* "*government* under which it assembles and acts is not a rightful sub- "ject of legislation; on the contrary, *it is revolutionary.* These right- "ful subjects must be such as are usual, and as are for the benefit of the "governed, and must be acted upon in recognition of the existence of "the Territorial government. The legislature of the Territory have not "inherent or original power to make or submit constitutions. Whatever "they may do in that direction is without authority, and is done only by "indulgence of Congress. Authority is scarcely needed on this point; "but I extract from a long opinion of the Attorney-General of the "United States the following: 'The Territorial legislature cannot, "without permission from Congress, pass laws authorizing the formation "of constitutions and State governments. All measures commenced "and prosecuted with a design to subvert the Territorial government, "without the consent of Congress, are unlawful." [Vol. 2, Opinions of Attorneys-General, page 726, etc.

Judge Crounse continues:

"So, in point of legality, there *was no more authority in the Ter-*
"*ritorial legislature to direct the people to vote upon the Constitution*
"*than might be possessed by a religious conference, a teacher's in-*
"*stitute, or a woman's rights convention.*

"If, then, we are satisfied with the legality of the proceedings thus far,
"and are prepared to say that a constitution can regularly be drafted
"by any one [even in a lawyer's office by a few self-appointed individu-
"als] and submitted under the decision of anybody, we have reached
"another very important inquiry: To whom shall the instrument be
"submitted, so as not to impair its validity? Where shall we look for
"any direction in the matter? The organic act is silent. We have not
"the aid even of an enabling act; if we had, and it should undertake
"to prescribe to whom the instrument should be submitted, I fear our
"objectors would take offence at the unwarrantable interference of
"Congress in *presuming to direct* on so important a matter. We must
"bear in mind that we are establishing a government for the people,
"male and female, black and white, young and old. All are to be gov-
"erned alike by the organic law to be made; and all should, in theory,
"be consulted in the establishment of such a law."

And in another place he says:

"It is said that a whole precinct in one county was thrown out,
"where the majority was largely against the constitution; that in ano-
"ther place a large number of soldiers voted in its favor, with no pre-
"text of right so to do; and, in other respects, irregularities intervened
"which might easily overcome the declared majority of a hundred.
"*This might well be, where a vote was had under no competent au-*
"*thority, and where no one, for ballot box stuffing, or for false*
"*returns, could be punished.*"

And again:

"It may be innocent vanity to arrogate to ourselves great import-
"ance as the people; and talk of the unwarranted interference by Con-
"gress in attempting to thrust upon this people institutions and laws
"against their wishes; but we should not forget that the very territory
"we are on was purchased and owned by the people of the United
"States; that they have directed Congress, under the Constitution, to
"make all needful rules and regulations respecting the territory; that,
"as long as we were on this territory, we were subject to, and had to
"abide by such laws as they chose to make; and that not until we
"were strong enough to defeat the United States by arms could
"we hope for any change from such territorial rule, without the permis-
"sion of Congress. How is such change to be effected? Some one or
"some body, assuming to act for the people, may make a constitution,
"and may elect officers for the proposed State. Congress may refuse
"to recognize such state government. It therefore amounts to naught.
"The people may assemble as often as they see proper, and may make,
"from time to time, a score of proposed constitutions, and elect as
"many sets of officers. *Each is as good as the other; and all are*
"*good for nothing unless indorsed by Congress. It is an act of*
"*Congress that gives vitality to the action of the people.*"

The act for the admission of the State of Nebraska into the Union,

passed Feb. 9, 1867, contains the following preamble, which shows the *reasons* of congress for such admission; it is as follows:

WHEREAS, On the twenty-first day of March, A. D. 1864, Congress passed an act to enable the people of Nebraska to form a constitution and State government, and offered to admit said State, when so formed, into the Union, upon compliance with certain conditions therein specified; and whereas, it appears hat the said people have adopted a constitution which, upon due examination, is found to conform to the provisions and comply with the conditions of said act, and to be republican in its form of government, and that they now ask for admission into the Union; therefore "Be it enacted," etc., etc.

It is thus manifest that the act of admission into the Union was based, *by the declaration of Congress itself*, upon an enabling act passed about three years previously.

In the long debate which led to the passage of the act of admission, Senator Charles Sumner said:

"Nobody doubts that Congress, in providing for the formation of a "State constitution, may affix conditions. This has been done from the "beginning of our history. There is no instance where it has been "omitted. Search the enabling acts of all the new States, and you will "find these conditions. There they are in your statute book, constant "witnesses *to the power of Congress, unquestioned and unquestion-* "*able.*" [Cong. Globe, 1866-67, Part 1, page 330.]

Hearken, also, if you please, to the "bugle notes,"—to "the clear, "distinct, brave, fearless, emphatic, unanswerable, and authoritative "tones" of George F. Edmunds, a senator from Vermont, one of the foremost constitutional lawyers of the age. He says: "We have a "right to create States; we have a right to govern Territories; *we* "*have a right to sweep them away.*"

And further: "Now, if we think it fit to erect the people of this "Territory into a State, we can say on what conditions they shall be a "State." [Cong. Globe, 1866-67, p. 332.]

And to sustain the above views of Judge Crounse, that Territorial legislatures have no power to pass laws for the formation of constitutions and State governments, from the coincident opinions of numerous jurists and statesmen, the following extract is given from a speech of James Buchanan in the Senate, referring to the Territories of Michigan and Arkansas. James Buchanan said:

"No senator will pretend that their Territorial legislatures had any "right whatever to pass laws enabling the people to elect delegates to a "convention for the purpose of forming a State constitution. It was an "act of usurpation on their part." [Cong. Globe, 1836-37, App. 73.]

Therefore, the people of a Territory, of their own volition, cannot resolve themselves into the corporation called a State, and, in this manner, have executive, legislative and judicial departments of government. They are not a State according to the American system, and can never be such until Congress, representing the national will, breathes into them the life-giving principle.

Power of Congress over the Territories.

PART II.

It is said that 5,000 copies of Gen. Hugh J. Campbell's pamphlet on this subject have been published for circulation among the people, all or most of which have been distributed. Each of them, of course, contains the "Introductory" noticed in my first communication. For over two months the author of the pamphlet, well knowing its full contents, has favored and assisted its dissemination, without a word of dissent or disapprobation as to the utterances of the "Introductory." He has thus assented to them and endorsed them. The principles of the Introductory are, however, but the natural and logical outgrowth from the premises of the pamphlet; and it is to be presumed there will be no attempt to evade or shift the responsibility.

The *people* of the United States, in ordaining and establishing their system of constitutional government, and in giving to *Congress* the sole and exclusive power to govern territories and to admit new states, by necessary implication forbade the exercise of any such powers by any other persons, or by any aggregation of persons, or by any other authority, whatsoever. The *vast body of the people* of the United States have thereby perpetually *ordained*, that the comparatively very small portion of the people who choose to go into *their* territories, have not the inherent and original power of governing themselves. So that if there be complaint or quarrel, or cause for either, on the part of the persons voluntarily coming into the territories, the fault must lie at the door of the great body of the people who ordained the constitution, and not at the door of Congress.

Moreover, Congress has the power "to sweep away" the territorial governments and to legislate for them directly; and this power emanates from the people of the United States. Congress, as to the territories, has arrogated no right or power which has not been granted to it by the people. In swearing to support the constitution of the United States or the organic act of a territory, a citizen becomes solemnly bound to an obligation of fidelity or allegiance, which cannot be

wantonly disregarded. Our members of the legislative assembly, as well as members of Congress take some such oaths.

OPINION OF SENATOR EDMUNDS.

But to return to the opinions of Senator Edmunds in relation to Nebraska:

"That people may propose to us a constitution for their local gov-"ernment which may not, in some of its respects, agree with our notions "of what is right and just—In such a case we have a right to declare "that anything in their laws or constitution to the contrary, if we erect "them into a state at all, shall be disregarded, and that our will in this "respect shall be the paramount law of the land, and the reason why "we have this right is because it grows out of the *necessary and* "*essential paramount power of Congress to erect the state or not, as* "*it pleases.*

"It was asked the other day, suppose these people do not choose "to act under it, suppose they do not choose to be a state of that de-"scription, hampered and qualified by these conditions which we impose "upon them, what is their position? I say, then, let them go without "being a state." [Con. Globe, 1866–67, page 332.]

The point of the pamphlet is that the people of Dakota up to the 46th parallel are a state. But, with stronger reason, all the people of all Dakota, are a state. Congress may ask the reason for this arbitrary distinction; and if it be not satisfied with the force of the reasons it may reject the overture. What then? Rejected, what becomes of the acts and the doings of the state government?

According to the new theory, rejection would not in any degree affect the legality of the so-called people's government. It would not take from us the privilege of governing ourselves. We have the right to provide our own courts, to collect taxes and to manage our own affairs. Why should a state government be, without further delay *formed*, unless it be for such purposes? What is the haste or urgency for a state government, if we cannot immediately put it into active operation?

But, according to Senator Edmunds's theory, there can be by no possibility a state until Congress says so. And Congress by its paramount power, may create a state embracing the entire area of the territory. WHAT THEN? As we approach the capitol where the nation's will is recorded, our movements should be guided by wisdom and prudence, and we should remember that the "bugle notes" which sound so grand on the pleasant waters of the river Sioux, may only produce jar and discord when sounded in the halls of Congress. *Hasten slowly*, is a maxim peculiarly appropriate in the present case.

But something more from Senator Edmunds may not be amiss—who says:

"Now, what is the question? The question is, first, whether we "have the power under the constitution of the United States, *to dictate* "*the terms and conditions and qualifications* under which territories "shall be created into new states, and admitted to an equal participa "tion in the active operations of the government. If we are a mere "machine, obliged to act whenever a territory presents itself, and in "whatever form it presents itself, as the Douglas doctrine upon which "this territory was first organized seems to declare, then of course, "there is no room for debate; we are exercising, then, merely executive "and not legislative functions, and we have no opportunity for the ex- "ercise of any discretion whatever.

"If, on the contrary, the grant of power which the constitution "gives to congress to admit new states into the national councils, is one "which implies judgment and discretion, implies that sense of responsi- "bility which ought to operate in all legislative affairs, then most clearly "it is our duty to scan to the uttermost letter the constitution of any "new-formed state which is presented to us. The constitution of the "United States upon the subject of our power over the admission of "new states reads as follows:

"'New states may be admitted by the congress into this union; but "'no new state shall be formed or erected within the jurisdiction of any "'other state, nor any state be formed by the junction of two or more "'states or parts of states, without the consent of the legislatures of the "'states concerned as well as of the congress.'

"There is an unqualified grant of power in the first instance, dis- "cretionary, depending upon the will of the law-making power of the "country for the admission of new states. Then there are imposed "upon it conditions and qualifications respecting the carving of new "states out of old ones, and no other condition and no other qualifica- "tion whatever. Therefore I take it to be plain and beyond contra- "diction, that it is within the clear constitutional power of Congress *to* "*prescribe the terms and qualifications and the time and the fitness*, "upon which any new state shall be created out of any of its territories. "It is a right which cannot be questioned at all; and it is a right "which, *independent of the constitution*, flows logically and necessarily "from the supreme legislative dominion which we have over the terri- "tories of the United States; territories many of whom, this very ter- "ritory indeed itself, were not within the dominion of this government "when the constitution was formed, and which, therefore, the constitu- "tion itself by its own vigor never *could have operated upon*."

SOME CONCLUSIONS OF THE PAMPHLET.

In the sixth conclusion drawn by the author of the pamphlet is asserted for and in behalf of the people of Dakota, "an unalienable, indefeasible, inherent and absolute right to self-government." The seventh conclusion is: "That they have the same inherent power and unalienable and indefeasible rights which are solemnly and formally asserted for the people of the United States in the Declaration of Independence, and reserved to them by the constitutions and by the Bills of Rights of

the several States, to alter, reform or abolish their government in such manner as they may think proper."

This is passing strange. This is most wonderful doctrine. Or is it a "glittering generality," or a mere political platitude? We are all considering the political power of the people of the Territories and their *status* in relation to the constitution. Nothing more and nothing less. No one denies that the people are the source of all political power, and that government is instituted for their good, and that its members are their agents and servants. But the people have, in the constitution, established a government, and invested it with so much of the sovereign power as the case requires. This organized government represents the collected will of the people as far as they have seen fit to invest that government with power. Such is the government of the United States, possessing the sovereign power of legislation to a certain extent, and subject to the provisions of the instrument through which the people delegated the power. Thus the right and the power of legislating for the people of the Territories has been granted to Congress. And this right and power *must continue to reside there until Congress shall declare otherwise.*

On this point let me quote from Daniel Webster:

"In the exercise of political power, under the American system, "through representatives, we know nothing, we never have known any- "thing, but such an exercise as should take place *through the pre-* "*scribed forms of law.* When we depart from that, we shall wand- "er as widely from the American track as the pole is from the track of "the sun.

And Mr. Webster goes on further and says:

"In what state has an assembly, *calling itself the people*, con- "vened without law, without authority, without qualifications, without "certain officers, with no oaths, securities, or sanctions of any kind, met "and made a constitution, and called it the constitution of a STATE? "There must be *some authentic mode* of ascertaining the will of the "people, else all is anarchy. * * All that is necessary here is, that "the will of the people should be ascertained, *by some regular rule of* "*proceeding, prescribed by previous law.*"

As it regards the grants of power to Congress, *the people have limited themselves.* To change, alter or abolish the grants in regard to the government of Territories there must first be an amendment of the Constitution. This is the mode prescribed by the people themselves, and the only mode. Anything else would be irregular, unauthorized and anarchical. It would be in violation of the Constitution. Again listen to Mr. Webster:

"I have said that it is one principle of the American system, that "the people limit their governments, national and state. They do so;

"but it is another principle, equally true and certain, and, according to "my judgment of things, equally important, that the people often *limit* "*themselves* They set bounds to their own power. They have "chosen to secure the institutions which they establish against the sud- "den impulses of mere majorities. All our institutions teem with in- "stances of this." [Argument of Mr. Webster in the Dorr case—Webster's Works, vol. 6, page 224.]

And so Judge Cooley, following in the footsteps of Mr. Webster, likewise declares, as follows:

"The people of the union created a national government, and con- "ferred upon it powers of sovereignty over certain subjects, and the peo- "ple of each state created a state government, to exercise the remain- "ing powers of sovereignty so far as they were disposed to allow them "to be exercised at all. By the constitution which they establish, they "not only *tie up* the hands of their official agencies, BUT THEIR OWN "HANDS AS WELL; and neither the officers of the state, *nor the whole* "*people as an aggregate body*, are at liberty to take action *in opposi-* "*tion to this fundamental law*." [Cons. Limitations, Fourth Edition, page 36.]

Consequently the constitution of the United States being the sovereign law of the territories, no person or persons inhabiting the territories can lawfully do anything which is *in opposition* to this fundamental law; not even the aggregate body of the people of a territory—to say nothing of a majority.

Judge Cooley (page 653) says more, to wit:

"In the new territories, however, *where the government of the* "*United States exercises sovereign authority*, it possesses as incident "thereto, the right of eminent domain, which it may exercise directly "or through the territorial governments; but this right passes from the "nation to the newly formed state whenever the latter is admitted into "the union."

But further, as to the "inherent power and unalienable" rights of a people of a territory, let us continue to quote from Senator Edmunds:

"*There is no inherent right in the people of any territory to be* "*constituted into a state.* Congress may never organize a territory at "all; it may never dispose of its public lands there; when organized it "may keep it in the perpetual condition of a territory if it pleases, be "cause all the considerations which govern such questions are consider- "ations which merely appeal to the ordinary legislative discretion of the "law-making power, and therefore every circumstance and considera- "tion which enters into the fitness of the thing itself, which is proposed "to be done, is a matter that we have no right to set aside." [Cong. Globe, 1866-'67, part 1, page 215.]

WHAT THE SUPREME COURT SAYS.

The Supreme Court of the United States has, however, settled the question of the sovereign authority of Congress over the Territories.

From the first case to the last the whole current of decisions is that the power of Congress to govern the Territories is unquestioned. Chief Justice Marshall, in pronouncing the opinion of the whole court, in the American Insurance company's case (1 Peters 511), emphatically declares this. That was a Florida case. On the 2d of February, 1819, Spain ceded Florida to the United States; and by the sixth article of the treaty of cession the inhabitants of the territories thus ceded "shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States." In 1822 Congress passed an act for the establishment of a territorial government in Florida, which government remained until March 3, 1845, when Florida was admitted into the Union;—and this notwithstanding the fact that the people there had held a convention and adopted a constitution on the 11th of January, 1839. For six years after they had formed a constitution and asked for admission, they were kept out! In the meantime they did not set up, *in opposition* to congress and the constitution, any pretense of an independent government of their own. With this brief digression let us come to the consideration of the case in 1st Peters' Reports. Did not the sixth article of the cession from Spain guarantee to the people of the Territory of Florida the enjoyment of all the privileges, rights and immunities of the citizens of the United States? And *as soon* as may be consistent with the principles of the federal constitution? And as the treaty ceding Louisiana contains an almost identical article, have not the people of Dakota similar rights and privileges? Have they not, by virtue of a treaty (which is the supreme law of the land), a right to participate in political power? Let Chief Justice Marshall answer these conundrums—who says:

"This treaty is the law of the land, and admits the inhabitants of "Florida to the enjoyment of the privileges, rights, and immunities of "the citizens of the United States. It is unnecessary to inquire "whether this is not their condition, independent of stipulation. *They* " *do not, however, participate in political power; they do not share* " *in the government till Florida shall become a state. In the mean-* " *time, Florida continues to be a territory of the* United States, "*governed* by virtue of that clause in the constitution which empowers "Congress to make all needful rules and regulations respecting the ter- "ritory or other property belonging to the United States. * * The "right to govern may be the inevitable consequence of the right "to acquire territory; whichever may be the source whence the power "is derived, *the possession of it is unquestioned.*"

Here we have from the Supreme Court, through the pen and intellect of Chief Justice Marshall himself, an express interpretation of the sixth article in the treaty ceding Florida. Is it not authoritative

enough? For over half a century what court or jurist has ever doubted or gainsaid it? There is, then, a distinction between personal rights and political rights. A citizen of one State, for instance, has no right to participate in the government of another State, even although the Constitution of the United States clothes him with "all the privi "leges and immunities" which belong to citizens of the several States. By the law of nations, independent of any treaty stipulation, the cession of territory by one sovereign to another does not affect the rights of property of the inhabitants. And so with regard to the other personal rights. The Spanish inhabitants of Florida and those succeeding them became, therefore, by this sixth article, doubly protected in the enjoyment of the privileges, rights and immunities which appertained to them as individuals. But this did not give them the right to take a part in any political power. They could not take a share in the government of Florida until that Territory became a State. In the interval, Florida was only a Territory under the sole and exclusive *government* of the United States. What can be plainer than this construction of the treaty by the great Chief Justice Marshall? It would be singular, indeed, if there could be any other possible interpretation. For how could a treaty with a foreign power bestow upon the people of a Territory any higher or greater rights than those belonging, under the Constitution, to the people of the States of the Union? How can the people of a Territory have political rights which cannot be enjoyed by the people of the United States? How can the former have political power which is denied to the latter? The government of the United States is founded on the authority of the people, and instituted for their safety, peace and happiness. And for the advancement of these ends they *have thought it right and proper* to grant to Congress sole jurisdiction over all the Territories. And this form of government can neither be altered, nor reformed, nor abolished, except in the manner they themselves have ordained and established, to-wit, by an amendment of the Constitution.

Therefore, the declaration of the people of the United States to the people of a Territory is this: We have established a government for *our* safety, peace and happiness; and by it we have expressly surrendered to Congress the government of the Territories, and the power, in its discretion, to admit new States; we have not reserved such powers to ourselves nor given them to you; for ourselves and for you, we have given them where we chose and where we had a right to repose them; they must remain there until our fundamental law be changed; you cannot do that for yourselves which we have no power to do for ourselves; we have thought fit, in this regard, to limit our own powers, and thereby you are restrained; you are not greater than ourselves, for

a part is not greater than the whole. Your claim as to "inalienable and "indefeasible rights" is very good in its proper place, but you twist it shockingly when you assert that, by virtue of such rights, you are at liberty to alter, or to reform, or to abolish the constitutional form of government which we have erected; under such claim the people of certain southern States recently undertook to abolish our government and to make one of their own, and you should constantly remember the fate of that experiment. A treaty is not higher than the Constitution, nor can the latter be altered or amended in any such fashion; and the treaty which you claim to be so "absolute and so inviolable" was never intended to give, and does not give to you, any participation in political power or any share in the government of the Territory until it shall become a State. Be wisely advised, therefore, and be warned that you have no right to govern yourselves, to elect State officers, to provide your own courts, to collect taxes, *and to manage your own affairs.*

In order to see whether the sixth article of the treaty of cession between Spain and the United States, in 1819, is as has been stated, almost identical with the third article of the treaty of cession of Louisiana, in 1803, let us compare them. In the treaty with Spain the sixth article declares that—

"The inhabitants of the Territories which his Catholic majesty "cedes to the United States by this treaty, shall be incorporated in the "union of the United States as soon as may be consistent with the "principles of the Federal Constitution, and admitted to the enjoyment "of all the privileges, rights and immunities of the citizens of the United "States."

By the third article of the treaty ceding Louisiana it is stipulated that—

"The inhabitants of the ceded territory shall be incorporated in "the union of the United States, and admitted as soon as possible, ac-"cording to the principles of the Federal Constitution, to the enjoyment "of all the rights, advantages and immunities of citizens of the United "States; and in the meantime they shall be maintained and protected "in the free enjoyment of their liberty, property and the religion which "they profess."

Now, it is manifest and certain that the interpretation of the treaty with France must be the same as that of the treaty with Spain. The one confers no more rights than the other, and the terms of both relate to the rights of persons—such as life, liberty, properity and religion. These personal rights are to be maintained and protected. These treaties admit the inhabitants to the enjoyment of these rights to the same extent in which they are enjoyed by other citizens of the union, but no further. By these stipulations protection and security are af-

forded to individual rights until the Territories shall become members of the Union. The people changed their sovereign, but their personal rights remained unaffected by the change, except as they were bettered. The full dominion thus acquired by the government of the United States did not divest the rights of individuals. But, on the other hand, they did not acquire any political power or any governmental rights. They could have no share or participation in the government while they remained in the territorial condition. And this condition must, in the nature of things, continue until Congress otherwise decrees.

CHIEF JUSTICE WAITE.

Without multiplying citations from the decisions of the Supreme Court in support of the doctrine of the sovereign authority of Congress over the Territories, it is sufficient to refer to the last enunciation from that bench. In the case of the National Bank vs. the county of Yankton (101, U. S. Reports, page 132). Chief Justice Waite delivered an unanimous opinion, from which the following is quoted:

"It is certainly now too late to doubt the power of Congress to "govern the Territories. There have been differences of opinion as to "the particular clause of the Constitution from which the power is "derived, *but that it exists has always been conceded.* The act to "adapt the ordinance to provide for the government of the Territory "northwest of the river Ohio, to the requirements of the Constitution, "(1 Stat, 50) is Chap. 8 of the first session of Congress, and the ordi- "nance itself was in force under the confederation when the Constitu- "tion went into effect. All territory within the jurisdiction of the Uni- "ted States, not included in any State, must necessarily be governed by "*or under the authority of Congress. The Territories are but* "*political subdivisions of the outlying dominion of the United* "*States.* Their relation to the general government is much the same "as that which counties bear to the respective States, and Congress "may legislate for them as a State does for its municipal organizations. "The organic law of a Territory takes the place of a Constitution as "the fundamental law of the local government. It is obligatory on and "binds the Territorial authorities; *but Congress is supreme,* and for "the purposes of this department of its governmental authority *has all* "*the powers of the people of the United States,* except such as have "been expressly or by implication reserved in the prohibitions of the "Constitution.

"In the organic act of Dakota there was not an express reserva- "tion of power in Congress to amend the acts of the Territorial legisla- "ture, nor was it necessary. Such a power is an incident of sover- "eignty, and continues until granted away. *Congress may not only* "*abrogate laws of the Territorial legislature, but it may itself leg-* "*islate directly for the local government.* It may make a void act of "the Territorial legislature valid, and a valid act void. In other words "it has full and complete legislative authority *over the people of the* "*Territories and all the departments* of the Territorial governments. "It may do for the Territories what the people, under the Constitution "of the United States may do for the States."

Should Michigan's Example be Followed?

PART III.

As heretofore stated, history abounds in bad examples; and they who shun them are wise. Success can never guild or hallow illegal means even to obtain a lawful end. Perhaps the worst folly of the kind was the Michigan folly of 1835-6. The arguments of its advocates were specious and superficially pleasing. There were not wanting *plausible* reasons for insisting that admission was a matter of right, and that the necessity for an enabling act was dispensed with by the ordinance of 1787. And all such arguments were grouped in the mind of Judge Cooley when, in 1878, he issued the fourth edition of his work.

But as that agitation began in 1833, let us glance at some contemporary events, in order to see what questions then occupied the public mind.

Calhoun had just recently drawn the attention of the whole country to his doctrine of State Rights. He professed to found this on the Virginia and Kentucky resolutions of 1798-9, from which he deduced the ultimate doctrine of nullification. On this subject the country was violently agitated for five years, and it was only by the passage of Mr. Clay's compromise tariff of 1833 that the impending collision between South Carolina and the general government was prevented. Still, this doctrine of State Rights had made a deep impression, and had a powerful following of those who would not go to the length of nullification. But the moral effect was bad. With many reverence for the Constitution was lessened; by some it was treated with disrespect; while by others it was considered as an enemy. It was termed a contract or a league. It might be disregarded or broken at the will or caprice of any one of the contracting parties. It was stigmatized as a rope of sand. Laws enacted under it might be treated as if they did not exist. The thoughtless were, in this way, led to admire the pluck of a people who stood up for the rights of a State.

In 1831 Lewis Cass was elevated from the Governorship of the Territory of Michigan to a seat in the cabinet of President Jackson, and the vacancy was filled by the appointment of George B. Porter of Pennsylvania. During Gov. Porter's administration efforts were made to induce Congress to pass an enabling act; but although the proper committee had reported on the matter, Congress adjourned without having had time or opportunity to take the requisite action. Thus the affair stood on the 6th of July, 1834, when the death of the Governor occurred, and Stevens T. Mason, then Territorial Secretary, became *ex officio* Governor. Here began the unique drama of the Michigan experiment—an episode unmatched in the nation's history. A new and dazzling actor appeared upon the scene, in whose absence it would have been like the play of Hamlet with the part of Hamlet omitted. Particulars will, therefore, prove interesting. This young man, Mason, was born in Virginia, and educated and reared in Kentucky. His father, Gen. John T. Mason, was a member of the celebrated Mason family of the former State, while his mother was a sister of Wm. T. Barry, the then Postmaster-General. Born in 1811, he was, in 1831, appointed by President Jackson, during a recess of the Senate, to the office of Secretary of the Territory; and he was sworn into office although he was but about twenty years of age. His youth, in view of the duties to be performed, rendered his appointment unacceptable to the leading citizens of Detroit, and a number of them convened and appointed a committee to remonstrate, and to ask the President for his removal. This was ineffective, and in the summer of 1832, when he had barely reached his majority, he was nominated and confirmed.

Upon the death of Gov. Porter in 1834, he became the acting and actual Governor, when he was only 23 years old. For although the President had nominated Mr. Gilpin of Pennsylvania to be the successor of Gov. Porter, yet the Senate rejected that nomination, and, consequently, it seemed pleasing to permit the Secretary to perform all the functions of the higher office, especially as he was backed by such powerful influences. This ardent and brilliant boy-governor, from the school of Virginia and Kentucky—trained in the principles of the famous resolutions of 1798-9—at once leaped forth as the leading spirit and the prime mover of the Michigan plan of operations. Indeed, to his genius and dash are due the chief strength and all the romance of the movement. Without him and his intimate associates, it would certainly have dwindled into insignificance.

A Governor at three-and-twenty years, he promptly began his administrative career in accordance with the political maxims in which he had been nurtured. He condemned Congress for its neglect and failure

to pass an enabling act, and favored the speedy assertion of the "*equal* "*rights*" of the people of the Territory.

The legislature of the Territory—known as the Legislative Council —was convened in extra session, and in his first message to that body dated Sept. 1st, 1834. after declaring that the leading object of the session contemplated the speedy admission of Michigan to the Union, he averred that, as Congress *had failed* to grant power to form a Constitution and State government, that there was "*but one course left for the assertion of our* EQUAL RIGHTS." He urged a census, and the calling of a convention for the institution of a State government, and the election of a Representative and Senators to Congress. "The "State of Michigan," he said, "will then have a right *to demand* ad- "mission to the Union." And he also called upon the Legislative Council for "an ultimate decision of the dispute with Ohio in relation to our "southern boundary." The Territorial Council was not slow to act. for, on the 6th of September, a law was passed for the taking of a census; and this was followed by an act making it a criminal offence for any person acting under the authority of the State of Ohio to exercise any official functions within the asserted boundaries of the Territory. He issued orders providing for the calling of the militia into active service, and commanding them to arrest the commissioners of Ohio "the "moment they stick the first stake in the soil of Michigan." The dispute alluded to was the celebrated one in relation to the boundary line between Ohio and Michigan; and in Gov. Mason's message are found the first official manifestations of that bitter feeling which, in a short time, was fanned into a flame, and caused thousands of troops to be marched to the line with the prospect of a sanguinary conflict.

On the 26th of January, 1835, the Council in regular session passed another act providing for a convention of delegates to assemble on the second Monday of May, 1835, for the purpose of forming a Constitution and State government. The delegates were elected April 4th, and convened May 11th, 1835. They were in session until June 24th. This body of men consisted of 84 members, who were politically divided into 74 Democrats and 10 Whigs. They formed a Constitution which, at an election the following October, was adopted by a vote of only about one-fourth or one-third of the voting population as shown by the recent census. In this inrtrument they fixed their own boundaries in accordance with their preconceived ideas of right; and under it the Governor had the appointment of all State officers, Judges of the Supreme Court and prosecuting attorneys.

Having advocated, in all these various ways, the alleged rights of the people, the young Acting Governor became, with the aggressive

classes, exceedingly popular; and though holding his commission from the general government, he ventured forward as a candidate for the governorship of the embryo State. But whilst at Detroit he was thus sailing with auspicious gales, a storm was gathering at Washington. It was evident that by these bold and novel measures he was placing himself in antagonism not only to the policy but to the authority of the Government. The President, when properly informed of his conduct, set his condemnation upon it by dismissing him from office!! Charles Shaler was appointed to supersede him in August, 1835; but Shaler having declined, John S. Horner was appointed Sept. 8, 1835. [Does this look as if President Jackson favored the Michigan scheme?] However, in the following October he succeeded in his ambition and was elected Governor of the so-called State. He was inaugurated November 3, 1835. It is said of him that he was genial in disposition, affable and courtly in manner, of fine personal appearance, and had the elements of great personal popularity. And when we look at his years and his vast influence over the men about him, we cannot doubt that he possessed unusual ability and capacity for public life.

The first session of the "State legislature" convened November 2, 1835, and adjourned March 28, 1836. Although the lawful legislature, under the organic act, had held its regular session in 1835, yet this new intruding body proceeded, without hesitation, to assume sovereign legislative power. It elected two United States Senators, John Norvell and Lucius Lyon; it incorporated seven banks, among which was the Manhattan bank; it incorporated other institutions, and notably the Detroit Young Men's Society; it enacted many other important laws providing in detail for the full establishment of a State government in all its departments—prominent among which was the act organizing the Supreme Court, defining its jurisdiction, and prescribing the number, qualifications and tenure of office of its judges. [And it is here to be particularly remarked that it was from this last named act (of March 26, 1836) the Supreme Court that decided the case of Scott vs. The Detroit Young Men's Society, derived its very existence and its powers. So that, if the Court, in that case, had decided otherwise than it did, it would have been an act of *felo de se.*] It undertook to memorialize Congress as if it were a lawful Legislature of a pre-existing State. In fine, this intruding body acted in all respects as if it had absolute sway, totally ignoring the government of the Union and the laws of Congress. It was actual nullification, so far as it went.

We have seen that this constitution, framed by the convention at Detroit, established the boundaries of the proposed State. The convention assumed to decide the grave question of the northern bounda-

ries of Ohio and Indiana—a question in which Illinois was also involved.

With these facts in view, and remembering that Michigan was not admitted into the Union until January 26th, 1837, let us recur to the pamphlet. The author, in referring to Michigan, says:—

"*Congress itself has decided* that a State government, framed by "the people of a territory, while the territorial government was still "in existence, without any enabling act of Congress, and before the "State was admitted into the Union, *was a legal and valid State* "*government.*"

Indeed! But when? Everybody is anxious to know so important a fact—if it be a fact. Looking at this extraordinary assertion and fresh discovery, any ordinary person would say that, if Congress has so decided, then it has stultified itself, and abdicated its sovereign power. No. Congress never did so silly a thing. This startling proposition, like some others in the pamphlet, has already worked mischief enough, and it is time that it should be controverted. Let us look at the facts as they appear in the Congressional Globe, and ascertain whether Congress *decided* that Michigan possessed a legal and valid State government prior to January 26th, 1837, the date of its admission.

CONGRESS DECIDES.

On the 11th of January, 1836, a memorial from the pseudo "Sen-"ate and House of Representatives of the State of Michigan," (then in session at Detroit), containing an argument maintaining their full right to be a State government,—came up for action in the house of representatives at Washington, on the motion of Mr. Hannegan, of Indiana, to reject the petition. (Congressional Globe, 1835–'36, page 85.) This house was Democratic, and James K. Polk was speaker. Mr. Hannegan, among other things, said:

"The memorial purports to come from *a power* which neither him-"self nor the House could recognize. If it came from *the Territory* "of Michigan, assuming *no powers*, he would willingly let it go to "the committee. In what situation would this House place itself by "accepting this memorial, coming as it purported, from the sovereign "State of Michigan? It would be recognizing her right to send her "communications here as a sovereign State. If we accept one com-"munication, we must accept all she chooses to send us."

Mr. Beardsley, of New York, spoke in favor of the reception of the memorial, chiefly on the ground of the general right of petition, and because there was nothing offensive in citizens of the Territory denominating themselves as the Legislature of Michigan.

Mr. Bond, of Ohio, advocated the rejection of the petition, saying that:—

"The memorial did not purport to come from *citizens* of "the Territory of Michigan, but from the Senate and House of Rep- "resentatives of the State of Michigan. We ought to take care how "we establish precedents of this nature. If the memorial was from "the citizens of the Territory of Michigan, he would admit their right "to have it referred; but this memorial was not from the citizens of "Michigan, it was from the Legislature of a State which had never "been recognized by Congress. *If there was such a State it was un-* "*known to the Constitution and laws.* Let us, then, be mindful that "we make no precedent in this case. Michigan has a representative "on this floor; and any petitions the people may have to present "through that representative, he would be ready to receive and refer."

Mr. Pinckney, of South Carolina, said:—

"He would have no objection to the memorial, if it came consti- "tutionally before us. What does it purport to be? A memorial from "the Senate and House of Representatives of the State of Michigan. "He would ask whether there was any such Legislature known to the "House? Is there any such State admitted into the Union? *Can* "*we recognize her as a State? Certainly not.* Either she is a Ter- "ritory or a State. If a State, how comes it that she is represented by "a territorial Delegate in Congress? If she is a Territory, how comes "this memorial from a State? *Congress would be transcending its* "*powers by receiving the memorial as coming from a State.*"

But it would unnecessarily lengthen this article were we to pursue this discussion in the House any farther. Enough has been shown to point out its drift. Most of the members were unwilling to reject the memorial altogether, because such action would infringe upon the right of petition; whilst, at the same time, they were adverse to the assumption that Michigan was a State. Finally, the House reached the following most important conclusion to-wit:—

Mr. Lane, of Indiana, moved to amend the motion to refer the petition to the Committee on the Judiciary, by adding that:—

"It be considered as a memorial *from the citizens of the Terri* "*tory* of Michigan."

He said:—

"He was desirous that the petition should go to the Committee "in its true garb, and not in one which it had no right to assume."

Mr. Hannegan's amendment to Mr. Lane's amendment, was as follows, that:—

"This House *in receiving* the memorial purporting to be from "the Senate and House of Representatives of the State of Michigan, "REGARD THE SAME IN NO OTHER LIGHT THAN AS THE VOLUNTARY ACT "OF PRIVATE INDIVIDUALS."

And it is a memorable fact that this motion was *decided in the*

affirmative. In this manner was the petititon received and referred. So that a Democratic House of Congress expressly decided that the alleged and assumed State Government of Michigan was NOT *a legal and valid State Government!!* They denied that there was existing any Senate or any House of Representatives of anything which could there be called a State! And when, under the cloak of the great right of petition, a set of men intruded themselves as the Legislature of the State of Michigan, they were told by the Representatives of the people of the United States that their pretensions could not be recognized, and that they were nothing but a lot of private individuals!! Not even was Mr. Pinckney, of South Carolina, found willing to support the Michigan scheme.

THE SENATE DECIDES.

But what was the fate of a similar memorial to a WHIG Senate of the United States? On January 26th, 1836, a like memorial was presented to the Senate from the so-called "Senate and House of Representatives of the State of Michigan," relative to admission into the Union. Mr. Hendricks, of Indiana, moved to take the former course that had been taken by the House in reference to a similar memorial from the assumed State of Michigan, to-wit:—

"*That this paper shall be considered in no other light than as* "*a memorial coming from individual citizens of Michigan.*"

[See Congressional Globe, 1835-'6, pages 138, 139, 140.] A debate ensued, from which the following extracts are taken:

Mr. Hendricks said:—

"He would be the last to oppose the giving a hearing to the me-"morialists; but certainly the Senate had not progressed so far as to "be prepared to receive a communication from Michigan as a State. "*If she wished to become a State she ought to proceed in the con-*"*stitutional manner that other States had done.*"

Mr. Thomas Ewing, of Ohio, said:—

"Their objections, as he understood them, were, that by receiving "this petition it would be admitting that Michigan was a State, and "that she had a Legislature as such.

"*Now he* (Mr. E.) *did not admit that Michigan was a State and* "*had a Legislature.* He knew very well that every citizen of the "United States and every State of the Union had a right to memorial-"ize Congress and to be heard; but the question was, was Michigan a "State? If there be not such a State, (said Mr. E.) then we cannot "accept the memorial in its present shape. We concede the point that "she is a State, (continued Mr. E.) if we accept this memorial, pur-

"porting as it does, to come from the Legislature of the State of Mich-
"igan."

Mr. Tipton, of Indiana, among other things, observed that :—

"When they brought themselves before Congress *in a constitu*
"*tional form*, he would readily agree to admit them into the Union.
"This, however, they had not done. If it was possible to admit them
"without doing injustice to the other States, whose boundaries they
"had attempted to overstep, he would be the first to do it; but what
"did the document before them declare? It was not the Constitution
"of Michigan, nor coming from the people of that Territory, but it
"purported to be a memorial coming from the Legislature of the State
"of Michigan! *There was no such political body as that assumed*
"*in the memorial*, and he and his colleague were not willing to ad-
"mit there was. He did not wish to reject the memorial. He was
"contented with the motion of his colleague," etc.

After some remarks of Mr. King, of Alabama, and Mr. Clayton, of Delaware, favoring the course which had been taken by the House, Mr. Hendricks submitted a motion as follows :—

"Ordered, That the memorial purporting to be from the Senate
"and House of Representatives of the State of Michigan, be referred
"to the select committee, appointed on the 22d of December, in rela-
"tion to the admission of Michigan into the Union; *and that the Sen-*
"*ate regard the same in no other light than as the voluntary act of*
"*individuals*."

Mr. Thomas Ewing, in reply to Mr. Niles, of Connecticut, said :—

"He would assure the Senator from Connecticut that there had
"been no attempt made there to shut this people out from a hearing.
"There were ways enough of presenting this communication to Con-
"gress, without the petitioners presenting themselves as the Legislature
"of a State. His objection was to the form in which the memorial
"came and not to giving the people of Michigan a hearing. * * *
"The true question before the Senate was, whether this memorial came
"from a State—whether the Senate could address Michigan as a State,
"and receive communications from her as such? * * * It was how-
"ever, absolutely necessary, when a communication came from an as-
"sociation of people styling themselves the Legislature of a State, that
"their designation should be a true one, otherwise they could not
"properly be heard."

Mr. Tipton further said :

"He would refer them to the third section of the fourth article of
"the constitution, which had reference to the terms of admission of
"new States. The people of Michigan had informed them that they
"had formed a State government, and that two persons had been elected
"as Senators to represent them in the Senate of the United States,
"who were here and claimed seats as such. *By the decision of the*
"*Senate, seats were not granted to them.* * * * He denied *the*

"*possibility of the existence of that body* (the Legislature) *as a po-*
"*litical body*, and it could not become such until, by their acts, they
"brought themselves within the provisions of the Constitution and laws
"of the United States, *which they had not done.*"

Mr. Porter, of Louisiana, remarked that:—

"He was not one of those who thought that petitions could be-
"received there about anything and everything. He thought they
"ought to be about such things as Congress could act on, and from
"some known person or corporate body, before they could properly be
"received. He did not wish to waste time on matters that seemed to
"be of trifling import, but it did appear to him that *the receiving a*
"*petition from Michigan as a State, would be an admission of the*
"*fact that she was what she called herself.*"

[In tracing this highly important debate, we arrive, at last, at the views of Mr. John C. Calhoun, of South Carolina, the ultra advocate of State Rights and the famous nullifier. One would naturally expect to find Mr. Calhoun in the forefront in espousing the cause of "the inalienable and paramount rights" of the people of Michigan, who had followed his teachings to their ultimate conclusions; but, alas, the author of the pamphlet has had the rashness to rush into paths where the mighty *doctrinaire* of State rights feared and refused to tread! The political dose prescribed by the novices of Michigan was too rancid for even Mr. Calhoun to swallow. Here are his opinions as to whether, in 1835-'6, Michigan had a legal and valid State Government.]

JOHN C. CALHOUN.

"Mr. CALHOUN REGARDED THE POLITICAL EXISTENCE OF MICHIGAN
"AS A STATE AS A NONENTITY. The gentleman from Massachusetts
"(Mr. Davis) had said that we were not bound to recognize a petition-
"er as a manufacturer because he called himself one in the petition.
"That case did not apply to a corporate body, and especially to a politi-
"cal body. The petition must or must not be received. The position
"it assumed was strongly illustrative of the position some gentlemen
"had assumed on this floor. *To receive this petition would amount*
"*to a recognition of Michigan as a State, and he could therefore*
"*not agree to receive it.*"

Eventually, Mr. Ruggles, of Maine, moved to *strike out* the qualifying words in the motion of Mr. Hendricks, to-wit:—

"*And that the Senate regard the same in no other light than as*
"*the voluntary act of individuals.*

On this motion to strike out the words quoted, Senator Hendricks said:—

"A memorial has been presented by the President of the Senate,

"purporting to be a memorial from the Senate and House of Repre-
"sentatives of the State of Michigan. Its contents were very partially
"known. So much of it, however, has been read by the secretary, as
"informed us that it was a paper *taking ground upon the ordinance*
"*of* 1787, and claiming for Michigan the right of admission into the
"Union as a sovereign and independent State. He had felt it his duty
"to resist this pretension; *and denying that any such case existed;*
"denying that Michigan was, or ought to be, considered a sovereign
"and independent State, he had moved that the memorial, for the time
"being, be laid upon the table. * * The discussion that had en-
"sued had given time to turn to our files, and he then had before him
"a document which showed what had been done with the same memo
"rial, as he believed, in the House of Representatives. He wished
"the thing to take the same course here; and, when up before, had
"withdrawn the proposition to lay on the table, and offered the propo-
"sition which had been read at the Secretary's table. He had not the
"remotest wish to exclude the document referred to, but he was anxious
"that, in referring it to a committee, *no sanction should be given to the*
"*character it assumed for the people of Michigan. He contend-*
"*ed that in no sense of the word could they be considered a State.*
"The laws of Congress for the government of Michigan Territory were
"in full force; and the Senate, in another capacity, had before them a
"proposition looking to the due extension of the laws of the United
"States in and over that Territory. The character in which the people
"of Michigan represented themselves in this memorial seemed to have
"been misapprehended by some senators who had favored the Senate
"with their views. They seem to understand the people of Michigan
"*as asking permission to become a State, but the memorial affirmed*
"*the fact that they were already in the enjoyment of a State gov-*
"*ernment, and, in that capacity,* it asked that they might be received
"into the Union. * * Her character, then, State or no State, was
"the point in controversy. The right of petition (Mr. H. said) had very
"little to do with the present case. Every citizen of Michigan had a
"right to petition, and the people of Michigan Territory had, unques-
"tionably, this right in *their proper character*, or in almost any other
"character that did not *array itself* against the laws and authority of
"the United States."

"But the people of Michigan, (continued Mr. H.) in presenting
"their Senate and House of Representatives as the legislative power
"existing there, showed that THEY HAD TRAMPLED UPON AND VIOLATED
"THE LAWS OF THE UNITED STATES, establishing a territorial govern-
"ment in Michigan. These laws were, or ought to be in full force there,
"but by the character and position assumed, *they had set up a govern-*
"*ment antagonistic to the United States.*"

In thus sketching this grave and momentous debate from the pages of the Congressional Globe, we perceive that the Senate and the House had before them this identical question asserted by the author of the pamphlet, to-wit:

"Whether a State government, framed by the people of a Territo-

"ry, while the Territorial government was still in existence, without "any enabling act of Congress, and before the State was admitted into "the Union, was a legal and valid State government."

[The assertion of the pamphlet is, that in reference to Michigan, such State government has been decided by Congress to be legal and valid.] We have noted the action and decision of the House; let us imagine the scene in the Senate of the United States on that 26th of January, 1836. Besides the participants in the long debate, there sat listening such men as Daniel Webster, Henry Clay, John J. Crittenden, Louis F. Linn, of Missouri, Samuel McKean, of Pennsylvania, John Tyler, of Virginia, Hugh L. White, of Tennessee, and others of national renown. The Senate had heard, as read by its secretary, the asserted rights of the people of Michigan under the articles of compact contained in the ordinance of 1787. The Senate fully understood that the action of that people was professed to be based upon the fifth article of the compact. Senators, on all sides, had heard Mr. Hendricks resisting this pretension, and denying that any such case existed. Such statesmen as have been named, were, of course, thoroughly acquainted with all the provisions of the ordinance, and were entirely qualified to judge whether the people of Michigan had such rights as were claimed by them. The acute intellects and just minds of the Senate took in the whole situation, and despite the entanglement of the right of petition, were ready to come to a decision. On the conclusion of Mr. Hendrick's argument, Mr. Ruggles remarked that he would be satisfied with the decision of the Senate on his motion to strike out. The question then was, shall the Senate strike out the words:

"And that the Senate regard the same in no other light than as the voluntary act of individuals."

ON TAKING THE QUESTION, THE MOTION OF MR. RUGGLES WAS LOST BY A VOTE OF TWELVE YEAS TO THIRTY NAYS! AND MR. HENDRICK'S MOTION WAS THEN ADOPTED!

Among the thirty who voted and decided that the claims of the people of Michigan, under the ordinance of 1787, to be a State were foundationless, and that no State Government did or could exist there until after admission,—we find the names of Webster, Clay, Crittenden, Mangum, Tyler and Leigh, of Virginia, and others already mentioned. The real, actual point was this, and only this, to-wit: Was Michigan then a State, possessing a lawfully organized State Government? Having "sixty thousand free inhabitants," had her people the right secured to them to organize a State Government? If the compact of the ordinance secured to them such right, who knew it better than Daniel

Webster, or Henry Clay, or John C. Calhoun, or the two Senators from Virginia—the State that had made the cession of the great Northwest Territory? They were as familiar with the six articles of the compact of 1787, as we are with the alphabet. If such right existed, who would have maintained it more resolutely than they? It was, however, no party vote. Michigan was then overwhelmingly Democratic; yet in the Democratic House and in the Whig Senate, members voted without regard to party interests or obligations.

It was eminently a judicial question, and in their judicial capacity they decided it. The decision was, that the people of Michigan, placing themselves on the ordinance and their "inherent and inalienable "rights," had not so much as the paltry power to create a Legislative body, whose petition as such, could he received by Congress!!

Thus perishes the airy fabric of the pamphlet! Thus bursts its fantastic bubble!! The vote of the Senate and the House, like a great tidal wave, crushes and sweeps away the entire structure.

The Michigan Case.

PART IV.

In Gen. Hugh J. Campbell's pamphlet is found the following statement, to-wit:

"The State Legislature of Michigan, elected under the new Con-
"stitution, met and organized. * * The territorial government still
"claimed to exist, yet this State Legislature proceeded to legislate, and
"assumed all the powers of a state government. Among other laws
"they passed a law incorporating the "Detroit Young Men's Society,"
"March 26, 1836. That society obtained title to certain real estate,
"and claimed possession. Its lawful existence was denied and its
"right to do any corporate act, or to own property, was tried in the
"courts, in an action of ejectment brought by the society.

"The defendants claimed that there was no legal State govern-
"ment, no lawful State Legislature, within the territory of Michigan,
"and no lawful incorporation. That the territorial government was
"still in existence; that the State government was not recognized by
"Congress, and that a territorial and State government cannot co-exist
"within the same territory.

"We hear something like this now, from *certain underlings.*
"Now hear what the supreme court of the State of Michigan say on
"this point, as reported in 1st Douglas, Michigan reports, page 119, in
"the case of "Scott vs. The Detroit Young Men's Society, lessee.

"The court there held that the society was a valid corporation; that
"the State of Michigan was fully and completely and lawfully formed
"when the people adopted the State Constitution on October 5th, 1835;
"that the territory and territorial government then and there ceased to
"exist; and that the State Legislature was a lawful and competent
"State legislature, whose laws must be respected and obeyed."

This statement of the case, as far as it goes, is correct; and it is the much vaunted case on whose pivot the whole cumbrous machinery of the pamphlet is made to turn. There actually were "*certain underlings*" before that supreme court who had the effrontery to contend as indicated, They did insist that there was no legal state government, no lawful state legislature within the Territory of Michigan, and no

lawful incorporation of the Detroit Young Men's Society. But all in vain. There had been other "*underlings*" preceding them, who maintained the same views—such as Webster, Clay, Calhoun and Ewing. The pamphleteer, in his close "investigation" of "all the known authorities upon the subject," has curiously omitted many things calculated to throw much light upon the subject. Some of these omissions have already been noticed, and others remain to be exposed. In his copious extracts from the case in 1st Douglass' Michigan Reports, he neglected, with the book before him, to inform his readers that that very Supreme Court, before which the case was argued, was itself the illegitimate offspring of the same illegitimate legislature. For, of the three members of the Court who participated in the decision, two [Ch. J. Morell and Justice Ransom] were appointed and commissioned by Gov. Stevens T. Mason in 1836, during the period of the usurping government; and the other, Justice Whipple, was afterwards appointed by the same personage. They had all been adherents of Mason and supporters of the insurrectionary movement.

But the counsel of the Detroit Young Men's Society (Messrs. Goodwin and Hand), did not omit to tell the Court to its face of its origin and pedigree, and to remind them of the petard, under their very seats, which was ready to explode and to hoist them away if a decision adverse to their clients should be made by their Honors. Listen to the argument on this point made by the lawyers above named, to that Supreme Court:

"The first legislature which assembled under the new Constitution "at an adjourned session which commenced on the first Monday of "February, 1836, enacted many important laws, providing in detail for "the full establishment of the State government in all its departments. "*In fact the whole fabric of our State government rests upon the acts* "*and doings of this legislature.* The act to incorporate the Detroit "Young Men's Society *was enacted by this legislature, March 26,* "1836. ON THE SAME DAY the act was passed organizing the Supreme "Court of the State of Michigan, defining its jurisdiction, and prescribing the number, qualifications and tenure of office of its judges; "*from which act this Court derives its existence and its powers. If,* "*then, this Court has any legal existence, the Detroit Young Men's* "*Society is well incorporated.*"

(See same report, page 128.)

The reverse of the proposition was plain. If that society was not legally incorporated by such legislature then the Court itself, the creature of the same body, had no legal existence. So we see that by such sprightly and pungent argument the Court was forced to look at the alternative of self-preservation or of judicial suicide. And it is always

solacing to the judicial heart to know that, by a long and venerable line of precedents, no court is bound to commit an act of *felo de se!*

There are several other rather interesting and amusing incidents in the case tending to show that the Court was hard strained in arriving at the desired conclusions. The trouble was how to establish the position that John S. Horner, appointed by the President, was the acting Governor of the Territory, and, as such, competent to act in 1836, whilst at the same time Stevens T. Mason was actively employed in the duties of Governor of the State.

But it was decided that for all the purposes of the case Horner was the Governor! There might be, then, two Governors! Another difficulty was as to how the duly appointed Territorial Judges could possibly be considered as having power to act in 1836, if the Court should decide that the new State came into existence on November 3, 1835, the date of its organization. But both these points were affirmatively decided!

It was decided that there existed a State with a competent law-making power—namely, a Senate, House of Representatives and Governor, from November 3, 1835, continuously to the time of admission; whereas, the Senate and House of Representatives of the United States had, as we have seen, decided, to the contrary. Thus Congress, by a solemn vote, had repelled the idea of a pre-existing State. The three Judges of Michigan maintained it. In the mind of any reasonable person where is the weight of authority? This thought is finely expressed by Senator Edmunds of Vermont, when he asked: "What, then, "makes a State? What gives it its life? It must necessarily be the law "which sets it up; and it is a mere quibble and a play upon words "which talks about *admitting a State as if it pre-existed.* It is the "act of admission that creates the political corporation, which is a "State. It is the law of Congress that creates the State." [See Senator Edmunds' argument in Cong. Globe, 1866-7, p. 339.

As to the reasons, however, for these singular and contradictory conclusions of the Supreme Court of Michigan, the curious reader is referred to the opinion itself.

But once more are we obliged to complain of the neglect of the pamphleteer. He forgot to mention the fact that the case of Scott vs. The Detroit Young Men's Society, lessee, *was taken to the Supreme Court of the United States.* The omission cannot be palliated by saying that the writ of error was dismissed for want of jurisdiction; for it is accurate information we are seeking as well as positive decisions.

The views of the Justices of that Court are very valuable, although they may be rendered outside of a given case. The case is reported in 5 Howard, 343.

By the 25th section of the judiciary act of 1789, it was provided that a final judgment in the highest court of a STATE may be re-examined in the Supreme Court by a writ of error, in a case in which is drawn in question the validity of a statute of, or any authority exercised under ANY STATE, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such validity. Hence, under the other conditions named, it must be the validity of a statute of A STATE which is drawn in question in order to confer jurisdiction. The point was, did the case of the Detroit Young Men's Society come within the terms of the judiciary act? The so-called law incorporating the society was enacted by a body of men claiming to hold legislative power before the act of Congress gave such power. Was this political body which passed the particular law a STATE? If not, then the case could not be re-examined by the Supreme Court, because it is only a *statute of a State* which can thus be re-examined. But had the Court, under the proper construction of the law, any power at all to decide upon the very point of State or no State? Fettered and confined by the wording and intention of the act, the majority of the Court, on this dry and nice question of power, were reluctantly driven (as it plainly appears) to the view that they had no authority to touch upon the main issue. Therefore, it was decided that the Court had not jurisdiction to try the question whether that political body was a STATE. But that the Court felt and believed there was an ample though a vigorous remedy for such evils as then existed in Michigan, is fully made to appear in the opinion, from which the following extracts are made.

Mr. Justice Woodbury, in delivering the opinion of the majority of the Court, indicates that the existence of such a case as was then before the Court, could not have been preconceived by the framers of the judiciary act. And it is not surprising; for who could have imagined such a contingency? It was, consequently, unprovided for. And the Supreme Court could assume no jurisdiction unless given expressly, or by necessary implication. In mentioning the reasons for the law, Justice Woodbury says:

"The fears were, from the reasons just enumerated, that, through "some inadvertence, if not design, A STATE might legislate against "some portion of the Constitution, or a treaty, or an act of Congress, "and might trench upon matters not within its province, nor belonging "to its internal concerns, but belonging to Congress, and which by ex-

"press terms or necessary implication, were forbidden to be acted on "by the *State governments.*"

That is, the framers of the act had their minds intent upon the action of State governments in the particulars named, not thinking at all upon evils and dangers of a like nature in the Territories. In other words, Congress was then exclusively legislating in reference to States.

THE SUPREME COURT CALLS IT A CRIME AND POINTS OUT THE REMEDY.

But what immediately follows is of the highest significance. Justice Woodbury continues to say:

"Such being the evil or danger, it precludes the idea that this "clause in the judiciary act had any reference to the fact *that public* "*bodies*, which had *not been duly organized and not been* "*admitted into the Union*, WOULD, AS STATES, *undertake to pass laws* "without being empowered to do it, which MIGHT ENCROACH ON THE "UNION OR ITS GRANTED POWERS, and hence should be thus guarded "against. * * Such conduct by bodies situated within our limits "unless by States *duly admitted* into the Union, *would have to be reach-* "*ed either by the power of the Union to put down* INSURRECTIONS, "*or by the ordinary* PENAL LAWS of the States or *Territories* within "which these bodies, *unlawfully organized*, are situated and acting. "While in that condition their measures are not examinable at all by a "writ of error to this court, *as not being statutes by a State or a mem* "*ber of the Union.*"

In another place Justice Woodbury says:

"Hence, two things must unite in order to justify it. (Meaning the "power of revision.) There must be an act of solemnity and importance, "such as a statute, and that statute must be by a State, a member of "the Union, and a public body owing obedience and conformity to its "Constitution and laws."

And in another place, going to the extreme verge of the proprieties of the case, he says:

"The argument was a fair one, that, as the Territorial government "was still in operation in Michigan for some purposes, *no new political* "*organization* could take place within its limits which was capable of "passing valid laws or charters of incorporation *without a previous* "*sanction by Congress*, under the 3d article of the Constitution." [Meaning, of course, *the 3d section* of Art. IV.]

From a court so hampered and, as it were, tongue-tied as to expression on the main point, what could be more direct or significant? It needed not half a page to dismiss the case for want of jurisdiction. Yet six pages of the report are occupied by the opinion, in which it is

manifest that every consistent mode is adopted calculated to exhibit the real sentiments of the Court relative to the Michigan scheme.

The opinion concludes as follows:

"Taking it for granted, then, we have shown that the revision in a "case like this must be of a '*statute*' and a statute of a '*State*' and "*not of a Territory*, or corporation, college, or *unacknowledged po*- "*litical body*, * * it follows that there is nothing to revise or cor "rect which is within the purview of the judicial functions of the gene "ral government *under the judiciary act.*"

Two of the Justices, M'Lean and Nelson, held that there was jurisdiction; and Justice Nelson concurred in an opinion delivered by the former.

OPINION OF JUSTICE M'LEAN.

The following is an extract from his opinion:

"No act of the people of a Territory, without the sanction of "Congress, can change the Territorial into a State government. The "Constitution requires the assent of Congress for the admission of a "State into the Union; and the 'United States guarantee to every "State in the Union a republican form of government.' Hence the "necessity, in admitting a State, for Congress to examine its Constitu- "tion.

"The act 'to incorporate the members of the Detroit Young Men's "Society,' was the exercise of sovereign power, a power totally repug- "nant to the sovereignty of the Union, in its Territorial form. Until "the 26th of January, 1837, Michigan was not admitted into the Union "and recognized as a State. Whatever effect this admission may have "by way of relation, on the exercise of the political powers of the State "prior to that time, is not now a question. The question of jurisdic- "tion relates to the time the act was passed, and its validity.

"*This act of incorporation was repugnant to the Constitution* "*of the United States*, under which the Territorial government was "organized. It was *repugnant to the laws of Congress* which formed "that organization. It was an exercise of sovereignty *incompatible* "*with the sovereignty of the Union in all its legal forms.* And this "act was declared by the Supreme Court of Michigan to be valid! I "cannot conceive of a clearer case for jurisdiction."

And Justice M'Lean further says:

"Now the conflict of power, in the case under consideration, is "clear and distinct. *The two sovereignties of the State and the Ter-* "*ritorial government cannot exist at the same time within the same* "*limits. The Territorial government exists in full vigor until it* "*is abolished by the admission of the State.* There was, then, *a di-* "*rect and irreconcilable repugnance* in the exercise of the sovereign "power by the State, *so long as the Federal authority was exercised* "*in the Territory.*"

The writ of error in the above case craved the reversal of the judg

ment of the Supreme Court of Michigan on the ground of the invalidity of the act which incorporated the society. The competency of the body called the legislature was assailed and denied. It was contended that that body was neither the legislature of a Territory nor of a State. And, clearly, it was neither. The alleged act of incorporation was, therefore, the act of an unacknowledged political body. Consequently, a writ of error could not reach it; and, under the judiciary act, the Supreme Court of the United States had no jurisdiction either to reverse or to affirm the judgment. *This was the exact point*, and the one decided.

But in getting at this point the Court did not hesitate to assert that the statute in question was not the statute of a State. There was nothing in the dry phraseology of the judiciary act which allowed inquiry into a *pretended* statute of any *pretended* political body in a Territory, *assuming and claiming to be a State or a State legislature.* It did not embrace such a case, nor had its framers ever contemplated such a contingency. Hence the writ of error was inoperative, and had to be dismissed.

THE SUPREME COURT OF OHIO DECIDES THE QUESTION.

We have heretofore seen that one of the acts of the pretended State legislature of Michigan, was the incorporation of the Manhattan bank. This bank was so incorporated on March 25th, 1836; and, in the court of common pleas of Lucas county, Ohio, it sued Myers & Comstock on a note for $1,000, which had been discounted by it. On the trial it was contended by the defendants that, under the Constitution of the United States, the alleged legislature of Michigan could not exercise legislative power, and that the said act of incorporation was therefore VOID, as being repugnant to the act of Congress organizing the Territory. It was argued that until the admission of Michigan into the Union as a *State*, her Territorial government *only* was recognized by the Constitution of the United States. That a Territorial and State government cannot exist at one and the same time. That the Territorial government continued until superseded by that of the State, and until the new State government was recognized *by act of Congress;* and that all State legislation, as such, is unauthorized until the admission to the Union is *complete.* Under the pleas of the defendants raising such issues, *inter alia*, the court of common pleas decided against them and in favor of the bank. A writ of error was issued and the case was argued before the Supreme Court of Ohio. It should not be overlooked that one of the lawyers who argued the case for Myers & Comstock, and took the legal positions above indicated, was an Ohio gentleman by the name of Waite. [In the choice and polite language of the pamphlet, another "*underling*" whose views were, afterwards, somewhat introduced

into the opinion of one Chief Justice Waite, from the same State.]

The Supreme Court of Ohio, by the unanimous decision of all the Justices present, declared that the court below *erred*, and the judgment *was reversed!*

(See Myers et. al. vs. The Manhattan Bank, 20 Ohio Reports, p. 283.)

The following syllabus is extracted from the report:

"The Territory of Michigan was organized by act of Congress in "1805, and a Territorial government created therein, that *continued* "*until her admission into the Union in* 1837 In 1835 the people "adopted a State constitution and elected a legislative body *under it*, "which passed an act to incorporate the Manhattan bank in March, "1836. HELD: That the creation of a corporation is an exercise "of sovereign legislative power; that at the time said act of incorpora- "tion was passed *the Territorial government was still in existence*, "and therefore the legislative assembly, under the Constitution, *could* "*not exercise legislative power, and* SAID ACT WAS VOID, *as repug-* "*nant to the act of Congress organizing the Territory.*"

OPINION OF THE COURT BY JUSTICE RANNEY.

From the opinion of Justice Ranney, which occupies nine pages, the following extracts are given:

"Did such sovereign legislative power pass the act relied upon by "the defendant in error? is the first question. In accordance with the "provisions of the Ordinance of 1787, 'for the government of the terri- "tory of the United States northwest of the river Ohio,' and under the "authority of section three of article 4, of the Constitution of the Uni- "ted States, Congress, on January 11, 1805, passed an act to organize "the Territory of Michigan. It is unnecessary to go into detail, but it "is sufficient to say that the Territorial government thus provided for "went into operation, and was regularly supplied with a succession of "officers in all its various departments, down, at least, to the passage "of the act of June, 1836, providing, upon certain conditions, for the "admission of Michigan into the Union. *It is very clear that a Ter-* "*ritorial and State government could not exist at one and the same* "*time.* (Owings vs. Speed, 4 Wheat., 714.) It follows, therefore, that "before a State government, clothed with legislative power, *could come* "*into existence*, the Territorial government must have *ceased to exist.* "The territory was ceded to the Federal government and belonged to "the Federal government in trust for the purposes specified in the deeds "of cession.

"The Territorial government was created by *a law of the Federal* "*government, Constitutionally made*, in respect to which the Consti- "tion of the United States (Art. 6) declares that 'it shall be the su- "preme law of the land, and the Judges of every State shall be bound "thereby, anything in the Constitution or laws of any State to the con- "trary notwithstanding.'

"Up to the time that the *State* legislature of Michigan *assumed* "to incorporate this company, this law had not been in any way re-

"pealed or revoked by the power that made it, nor had they agreed to "or approved of any State government to supersede the one created by "it. Nor had the Territorial government receded from the Territory; "on the contrary it was in full life, manned in all its departments by "appropriate officers.

"How, then, was this government, created by a supreme law of "Congress, brought to a close, and overthrown, so as to make room "for the State government, which brought into existence this act of in "corporation? It is claimed to have been done *by the people of "Michigan by the adoption of a State Constitution and the election "of officers under it;* and further, that this might legally be done, as "it was done, without the assent of Congress or any action on the part "of the general government, by virtue of article 5 of the ordinance of "1787. This article, after providing that there should be formed in "the territory not less than three nor more than five States, and giving "the outline of the boundaries of each, proceeds to say, that 'whenever "any of the said States shall have 60,000 free inhabitants therein, such "State shall be admitted, by its delegates, into the Congress of the "United States, on an equal footing with the original States, in all re-"respects whatever; and shall be at liberty to form a permanent Con-"stitution and State government; Provided, the Constitution and gov-"ernment so to be formed shall be republican, and in conformity to the "principles contained in these articles.'

"By article four it is provided that 'the said territory, and the "States which may be formed therein, shall forever remain a part of this "confederacy of the United States of America, subject to the articles "of confederation, and to such alterations therein as shall be Constitu-"tionally made,' etc. These extracts, subject to such modification as "the subsequent adoption of the present Constitution effected, and es-"pecially section 3 of article four, in relation to the admission of new "States, show the relation that the Territory bore to the general gov-"ernment, and the rights of inhabitants, as to *a change from a Terri-"torial to a State government.* We have seen that the Territory, ei-"ther under State or territorial government, must *forever remain a "part of this Confederacy.*"

Justice Ranney continues to say that:

"To sustain the power of the State of Michigan to legislate *before "her admission into the Union*, we are referred to the case of Scott "vs. The Detroit Young Men's Society, decided by the Supreme Court "of Michigan (1 Doug. 119), and to the same case in the Supreme "Court of the United States (5 How. 343). In this case it became "indispensable for the defendants in error to establish two facts: First, "that they were duly incorporated; and second, that they had a deed "from the government of the land in controversy. The first they es-"tablished by an act of the legislature of the State of Michigan, passed "March 26, 1836; and the second by a deed from the Governor and "Judges of the Territory of Michigan under the authority of an act of "Congress, passed in 1806, executed on July 1 1836.

"The State court holding that the act of incorporation *was not "invalid* on the ground that the State government had no legal

"existence until after the admission of Michigan into the Union "January 26, 1837, and that, 'notwithstanding the previous or- "ganization of the State government, the Governor and Judges of the "Territory of Michigan remained in office until after July 1, 1836.' "*The reasons for both these conclusions*, SEEMINGLY CONTRADICTORY, "are given at length in the opinion. I will not stop to examine them "further than to say, that the first is based upon the assumption that "article five of the ordinance secured absolutely the right to the people "of Michigan to form a State government whenever the Territory con "tained 60,000 free inhabitants; and that 'that right could in no way be "modified or abridged, or its exercise controlled or restrained by the "general government.'

"The Supreme Court of the United States dismissed the cause for "want of jurisdiction, and HELD that, 'in order to give this court juris- "diction, *the statute, the validity* of which is called in question, must "be passed by a STATE, a member of the Union, and a *public body* "owing obedience and conformity to its Constitution and laws;' and "that if public bodies, not duly organized or admitted into the Union, "*undertake to pass laws which might encroach on the Union or its "granted powers, they might be put down under the power* TO SUP- "PRESS INSURRECTIONS, *or by the penal laws of the States or Territo "ries in which they are situated;* but that their measures were not "examinable by this Court on writs of error. *They are not a State, "and cannot pass statutes within the meaning of the judiciary act.*"

This is the construction put upon the opinion of the Supreme Court of the United States in the case of the Detroit Young Men's Society, by so eminent an authority as the Supreme Court of Ohio.

But further from the opinion of the latter court. Justice Ranney proceeds to say:

"This decision entirely *overthrows* the position taken by the "court below, and SETTLES THE QUESTION that Michigan, at this time, "was not a State '*in this confederacy*,' '*owing obedience and con- "formity* to its Constitution and laws.' It is insisted that it was no "longer a Territory. *If a State at all*, therefore, *it must have been* "ONE OUT OF THIS CONFEDERACY,' *in direct violation of the very "ordinance to which she appeals.* Justices M'Lean and Nelson dis- "sented from the majority of the Court upon the question of jurisdic- "tion. There is nothing to show any difference of opinion between "them and the majority, on the main question; *indeed the view taken "by the majority, so far as it has any bearing, greatly strengthens "that of the minority.* I regard the views taken by Justice M'Lean "of the merits of the controversy, in the opinion delivered by him, "in which Justice Nelson concurred, as *entirely unanswerable*, and "adopt them to the fullest extent."

After making quotations from the opinion of Justice M'Lean, Justice Ranney, for his court, comes to the following conclusion, to-wit:

"Satisfied of the correctness of these positions, and yielding obedi- "ence to the positive requirements of the Constitution of the United

"States, WE HOLD that the legislature of the State of Michigan, assem-
"bled under the Constitution afterward submitted to Congress, COULD
"NOT, on March 25, 1836, when the act in question was attempted to
"be passed, *rightfully exercise any legislative power whatever.*"

Such was the judgment of a Supreme Court, whose existence and powers were in no wise involved in its decision. The much boasted case of the Detroit Young Men's Society vanishes into thin vapor. Like the rod of the magician, it is swallowed by the rod of authority. It is overruled by the Supreme Court of Ohio following the lead of the Supreme Court of the United States!

Are these the voices of the "*certain underlings*" referred to by the pamphleteer? Are the "bugle notes" and "tones" of the three Judges of the Supreme Court of Michigan now as "clear, distinct, brave, fearless, emphatic, *unanswerable and authoritative*," as they formerly seemed to be? Is it not a case which, meteor-like, flames lawless through the judicial sky?

The Real Causes Which Produced the Conditional Act of Congress, of June 15, 1836.

PART V.

After a long silence, our United States Attorney advances to the front, once more to advocate his revolutionary scheme that the people of Dakota, south of the 46th parallel, "ARE A STATE *and ought, with "out further delay, to form a State Constitution and a State gov- "ernment.*"

From his recent speech it appears that he still clings to his original idea that we have, of ourselves, the authority to adopt a Constitution, and "the right to elect State officers, to provide our own courts, "to collect taxes and manage our own affairs."

He has not abandoned his previous notions, but pertinaciously adheres to the infatuation that the example of Michigan is a proper one to follow. Notwithstanding his discomfiture at the hands of the Sioux Falls convention, he still insists upon the correctness of the propositions originally assumed in his pamphlet; and, in confirmation thereof, points to the passage by Congress of the *conditional act* of June 15, 1836. The broad assertions made and renewed by him, without any historical facts to sustain them, require some further review and comment.

It is denied that Michigan was admitted on the strength of the reasons or causes asserted by him. On the contrary, they had little or nothing to do with it. In one important particular, the ordinance of 1787 had been violated by Congress in the admission of Ohio, Indiana and Illinois, and it was again repudiated in the admission of Michigan We refer to the "unalterable" boundary line fixed by the fifth article of the compact.

But the question properly arises, how, after all, came Michigan to

be admitted into the Union? What were the events and the causes leading to such admission? And is it a precedent which can be safely followed?

We have seen in former articles that Gov. Stevens T. Mason, in Sept., 1834, in his first message to the Legislative Council, then convened in extra session, called upon them for an "ultimate decision of the dispute with Ohio" in relation to the southern boundary line of Michigan. That he issued orders providing for calling the militia into active service, and commanding them to arrest the commissioners of Ohio "*the moment they stick the first stake in the soil of Michigan.*" These orders were to his Brigadier General Brown. We have also noticed the bitter feeling engendered by this dispute between both parties, and the fact that thousands of troops were marched to the line, with the prospect of a sanguinary conflict. Thus occurred, in 1835, what was commonly called "the Toledo war." It was a contest that threatened the direst consequences, and which agitated the whole country. The condition of affairs was so alarming that President Jackson appointed two commissioners to proceed to Michigan and Ohio to preserve the peace of the country which he believed was in imminent danger of violation. The gentlemen sent on this important mission were Mr. Rush, who had filled many honorable stations under the government, and Mr. Howard, a member of Congress from Maryland. It was owing to the forethought and firmness of Gen. Jackson, and to the character and ability of these commissioners, that a fratricidal war was happily averted.

Upon investigation into the causes which led to this armed demonstration, it was ascertained that the leaders and adherents of the Michigan plan were stubbornly determined on two things: First, that they had a right to be a State, and that, by the steps they had taken, Michigan was actually and lawfully a State, fully competent to regulate her own affairs as a sovereign, independent power, although not allowed as yet to become a *part* of the confederacy, and although she was not admitted into the Union; and Second (but more plausible), that her southern boundary line, as established by the act of Congress of January 11, 1805, creating the Territory, could not be changed or altered by *any act of Congress whatsoever* (unless by her consent), because that was *the line fixed* by the "unalterable" compact of 1787, to-wit: "*an east and west line drawn through the southerly bend or extreme "of Lake Michigan.*"

On the other side, the people and authorities of the State of Ohio, denying all the said conclusions, contended that of the five States to be carved out of the Northwest territory, three had already come into the Union by regular enabling acts, to-wit: Ohio, Indiana and Illinois,

That Ohio having been duly authorized to form a Constitution and State government by the act of April 30, 1802, had, in the same year, proceeded to do so, and, in that instrument, had especially provided against the claim afterwards set up by Michigan, to-wit: by providing for "a direct line running from the southern extremity of Lake Erie to the most *northerly cape of the Miami* (or Maumee) *bay*. [See Art. 7, Sec. 6, Ohio Const. of 1802; also modern maps.]

That, in 1835, in view of the encroachments of Michigan, the legislature of Ohio had passed an act maintaining this line, and appointing commissioners to survey and mark it—the act which had especially aroused the ire of Gov. Mason.

Ohio further contended that this view accorded with that of the framers of the ordinance, as appeared by the map of their times; and that the question was closed when Congress, in 1802, accepted the Constitution of Ohio as a whole, without *any dissent to the proviso* named, and admitted her into the family of States.

She also insisted that this was in harmony with the spirit and true intent of the fifth article of compact when construed together; and, moreover, that Congress had formerly put the proper construction upon that article when, by the enabling act of April 19th, 1816, in relation to Indiana, it had declared that the northern boundary of said State should be "an east and west line drawn through a point *ten miles north of the southern extreme of Lake Michigan;*" and when, also, by the enabling act relative to Illinois, approved April 18th, 1818, the northern boundary of the latter State was established along "*north latitude forty-two degrees, thirty minutes,*" about *forty miles north* of the southern extreme of the lake.

So that, if the claim of Michigan should prevail, Ohio would lose the Toledo country, including the mouth of the Maumee river and its bay, with its cities, towns, inhabitants and public improvements—comprising an area of about 500 square miles. And Indiana (to say nothing of Illinois) would lose a tract of country ten miles in width north and south, extending from Lake Michigan to her eastern boundary, a distance of over 100 miles, and containing more than 1,000 square miles.

Such were found to be the causes of the impending conflict of arms by which the exasperated men of the opposing parties proposed to settle the dispute. The puzzle was to untie this knot without the instrumentality of the sword. Finding there was a series of complications of the gravest nature, caused, in the past, by Congress itself, the commissioners of President Jackson could see no other solution than through the same medium by which the difficulty and the danger had been cre-

ated. Congress alone could supply a remedy by correcting the legislation of the past, and establishing the southern boundary of Michigan before her admission into the Union. It was foreseen, however, that this would be a work of concession and compromise. The commissioners having succeeded in arresting the outbreak of hostilities by a kind of truce (referring the whole matter to Congress), made their report to the President, who highly approved their conduct. That the danger was not magnified or exaggerated will be perceived from the quotations from eminent authorities which follow, taken from the Congressional Globe.

This was the attitude of affairs when the first session of the twenty-fourth Congress commenced on December 7th, 1835, and when, three days later, President Jackson sent his special message to the Senate. In this message, after briefly stating the claim of Michigan as presented, he makes use of the following language, viz:

"That instrument (the Constitution), together with various other "documents connected therewith, has been transmitted to me for the "purpose of being laid before Congress, to whom the power and duty "of *admitting new States into the Union exclusively appertains;* "and the whole are herewith communicated for your early decision."

The President also sent to the Senate a message relative to the northern boundary of Ohio; and the General Assembly of Indiana forwarded a joint resolution instructing her Senators and Representatives to oppose the admission of the people of Michigan as a State unless they, by their Constitution, should acknowledge the northern boundary of Indiana.

John Quincy Adams said in the House, in reference to the condition of the questions then before Congress, as follows:

"Since that time (the last session) *transactions of great moment* "*to the peace and welfare of the whole Union had occurred.* The "State of Ohio, by her legislative and executive authorities, had under-"taken to settle this question by main force. She had brought out her "armies in array to settle this question, and if those armies had not "been met by the adverse and hostile armies of the other party, it had "been more owing to the discretion of the President of the United "States (Andrew Jackson) than to the discretion of either of the par-"ties to the controversy." [Cong. Globe, 1835–6. page 53.]

In such manner did John Quincy Adams compliment his political foe, President Jackson, for having sent the commissioners, and for having commanded and preserved peace between the belligerent parties.

Mr. Kinnard of Indiana said in the House:

"We must settle this dispute by choosing the most plausible and

"rightful of the *alternatives* which are presented to us. If we do not, "we shall behold increased excitement growing out of the present state "of things. As fast as time progresses, the evil will grow in magnitude, "and it will be still further beyond our reach to apply any *satisfactory*, "*proper and peaceful remedy.*" [Appendix, id., p. 458.]

In this session of Congress (1835–6), to add to the perplexities of the situation, measures were proposed of the following nature: First, for the admission of Michigan; and secondly, for the admission of Arkansas, as a counterpoise claimed by the slaveholding States; thirdly, for settling and establishing the northern boundary of Ohio, Indiana and Illinois; fourthly, for establishing the northern boundary line of Ohio, and to provide for the admission of Michigan upon certain conditions; and fifthly, for establishing the Territory of Wisconsin.

To increase the confusion, Mr. Jones, the Territorial delegate, was busy in the House presenting memorials of the Legislative Council of *Michigan Territory* and petitions of its inhabitants, and in offering resolutions and making speeches; whilst the legislature of the alleged *State* was equally busy at Detroit in passing laws, and its representative to Congress, Isaac E. Crary (claiming a seat as a member), was, by order of the House, only admitted as a spectator within the hall!! [Con. Globe, 1835–6, pages 217 and 59.] In the Senate the pretended Senators from Michigan were likewise accorded the high privilege of spectators!!!! A large portion of the session was devoted to the consideration of the best means to heal these difficulties. Some citations from the numerous debates will afford correct information:

Senator William Hendricks, of Indiana, said "he had but one "course to take, and that was to resist the admission of Michigan as a "State of this Union, at every step, until she *expunged* from her Con"stitution *her unfounded claim upon the territory of Indiana.* "* * * Here in the case of Michigan the question of *State or no* "*State* has yet to be settled, as well as the question of *boundary*, in"volving, as it does, the integrity of one or more of the States." Senator Hendricks further said:

"Sir, I undertake to say that Michigan is not a State, neither *de* "*facto* nor *de jure*, and that *she never can be a State with her as*"*sumed boundaries* The President of the United States is *bound* to "see *that the laws of the Union* are faithfully administered in and over "the *Territory* of Michigan, until the people of that Territory shall "have the permission of Congress to pass from a Territorial to a State "government, and no one can doubt that he will faithfully perform that "duty. * * There is no case in existence to which the present con"dition and attitude of Michigan can be assimilated." [Cong. Globe, id., 42, 43.]

Senator James Buchanan said:

"He never should, whilst he had the honor to occupy a seat upon

"that floor, give a vote which might tend *to disturb* the States of Indi-
"ana or Illinois in the peaceable possession of all the territory *within*
"*their present boundaries*. The constitutional rights of these States,
"as well as sound policy, equally condemned any course which could
"interfere with their *chartered limits*. He was as free to express this
"opinion as the Senator from Indiana himself."

Senator Tipton of Indiana said:

"What had followed the period he had just alluded to? Why,
"sir, we have had flaming general orders calling upon the *militia to*
"*stand by their arms* to defend the integrity of certain boundaries es-
"tablished by Congress, and which no authority under heaven, *besides*
"*Congress*, had the right to alter. It was true that no blood was shed
"by these tumults but it was equally true that things assumed, at one
"time there, *a most alarming aspect*. * * If Michigan were ad-
"mitted on the terms she now asks, every Senator must see that an
"appeal to the courts of the country *or to arms* was unavoidable; it
"would produce ill feelings among the people on either side of the
"boundary line, and a state of things must ensue that every patriot
"should avoid. He therefore *appealed to Congress to settle the diffi-*
"*culty before admitting Michigan into the Union.*" [Cong. Globe. id., p. 42, 43.]

The confusion was worse confounded by the introduction of the element of party politics. The speedy and timely admission of Arkansas and Michigan would, in November, 1836, give six electoral votes to Van Buren in a doubtful struggle with the Whigs. And this fact is prominently alluded to in the debates. In the Senate the charge of the bill for the admission of Arkansas was placed in the hands of James Buchanan, and that for Michigan was left to the care of Thomas H. Benton. As a question of political or party power, the House might be reckoned on to pass any bills for the admission of the two proposed States, but in the Senate the condition was different. Here it was found necessary to have the votes of the Senators from Illinois, Indiana and Ohio, and those who, like them, would not agree to the dismemberment of those States, by going back to the line of the ordinance, or "an east and west line drawn through the southerly bend or extreme of "Lake Michigan." With these Senators the determination was inflexible not to admit Michigan until she consented to abandon the claimed territory. Therefore it was that the bill was amended by making this boundary and the admission of Michigan "*go hand in hand together.*"

In relation to this James Buchanan said in the Senate, as follows:

"He understood that an amendment was prepared which would
"meet the views of his friend from Delaware, Mr. Clayton, by making
"this boundary and the admission of Michigan go hand in hand together,
"for she certainly *never could be admitted* until she consented to *re-*
"*linquish the claimed territory to Ohio and Indiana.*"

In this way arose the amalgamated bill, afterwards passed, entitled "*An Act to establish the northern boundary line of the State of "Ohio, and to provide for the admission of the State of Michigan "into the Union upon the conditions therein expressed.*" The act of June 15, 1836. [See 5th Stat. at Large, p. 49.]

This amended bill made it the primary object to settle the boundary question, as the first section, the caption, and the debates plainly show. By its express terms, the claim of Ohio was allowed and fixed; and while Michigan lost that for which she had so earnestly contended, she was more than compensated by the grant of the Upper Peninsula, then thought of little value, but now esteemed as possessing vast wealth. Not merely this, but in the bill the northern and eastern boundary lines of Indiana were affirmed as established by the act of April 19th, 1816. As to Illinois, her northern and eastern boundaries were to be reaffirmed in the bill for the creation of the Territory of Wisconsin; and, in fact, they were so fixed in that law, enacted April 20, 1836—the first of these complicated measures acted upon by Congress.

Notwithstanding all these immense efforts to conciliate and to compromise, it was still apparent that admission was as yet uncertain. One of the principal objections urged was, that the proceedings had been lawless and revolutionary; and that for the example's sake, if for no other reason, the application should be rejected. Another main objection was, that the articles of compact were forever unalterable, and that the line fixed by the fifth article and by the act of 1803, was irreversible. On this point the struggle was, whether the ordinance made prior to the Constitution, and enacted by an authority that ceased upon its adoption, could put limitations upon the Constitution; or whether the ordinance, receiving its only force, under the new government, from the act of Congress of August 7, 1789, should not be construed and taken in subordination to the Constitution.

But there is no present opportunity to explain all the various elements which entered into the discussion. Further extracts from the opinions of those who participated in the debates will convey a general idea of the gravity and difficulty of the situation.

John C. Calhoun of South Carolina said in the Senate:

"My opinion was and still is, that the movement of the people of "Michigan in forming for themselves a State Constitution, *without* "*waiting for the assent of Congress*, was *revolutionary*, as it threw "off the authority of the United States over the Territory," etc.

Mr. Prentiss, a Senator from Vermont, agreed with Mr. Calhoun, and said:

"He viewed the movements of these two Territories, with regard "to their admission into the Union, as *decidedly revolutionary*, form- "ing their Constitutions without the previous consent of Congress, and "importunately knocking at its doors for admission."

Mr. Porter, a Senator from Louisiana, said:

"Being opposed in principle to any State coming into the Union "in the manner attempted by Michigan and Arkansas, and which he "considered so *revolutionary*, he felt himself constrained to vote "against the bill."

In the House, Mr. Hamer of Ohio said:

"Ohio acknowledges no right in the Supreme Court to try such "questions (of boundary); she will never submit to such a mode of de- "termination. It is a legislative question and not a judicial one. Here "is the place to determine it. Congress has only to relinquish the "claim of the Federal government to the country in dispute, and there "is an end of all controversy." * * "We are anxious to have the "boundary question settled and settled correctly, before Michigan comes "in; and our State has instructed us to oppose her admission until the "difficulty is removed."

In the same speech Mr. Hamer said:

"This would be disastrous to Ohio. Her public works are sus- "pended for a settlement of this question. [Referring to the construc- "tion of a canal connecting the Maumee Bay with the Wabash river.] "Her interests, pride and feeling are deeply involved in it. Her people "are impatient to see it terminated. *A border war is lowering upon "our northern frontier;* and the moment Congress shall adjourn "without adjusting this dispute, *it will break out with a train of out "rages and bloodshed* that must be profoundly deplored by every man "who loves his country."

And he further remarked:

"We have the whole subject now under our own control. We can "put an end to a most distracting contest that has agitated our country "from Maine to Georgia, and from the Atlantic to the most remote set- "tlement upon the frontier. There was a time when the most painful "anxiety *pervaded the whole nation*, and whilst each one waited with "feverish impatience for further intelligence from the disputed territory, "he trembled lest the ensuing mail should bear the disastrous tidings "of a civil strife in which brother had fallen by the hand of brother, and "the soil of freedom had been stained by the blood of her own sons. "But the storm has passed. * * Let us pass this bill. It does jus- "tice to all. *It conciliates all.* Its provisions will carry peace and "harmony to those who are now agitated by strife and disquieted by "turmoils and disorders." [App. to Cong. Globe, 1835–6, p. 669.]

From the exhaustive argument of Mr. Horace Everett, of Vermont, the following is taken:

"In relation to the point in controversy with Ohio, such objections

"in my opinion, formed on the evidence present, do exist; arising, first, "from the *public works* of Ohio, to which *the mouth of the Maumee* "*river is necessary*, as an essential to Ohio; and secondly, from the "*danger to the peace of the country* from the acerbity of the contro "versy. On these grounds, and on these alone, I am in favor of grant "ing the disputed territory to the State of Ohio." [Id., p. 562.]

Mr. Bouldin of Virginia said in the House:

"*He did it for peace sake.* The United States and Ohio, as well "as Michigan and Ohio, seemed last summer (1835) to be getting to a "point which was *little short of war.* He had voted to give Ohio the "land in dispute, and Michigan much more in the place of it, for peace "sake." [Cong. Globe, id., p. 558.]

Senator John Davis of Massachusetts said:

"I do not like the mode in which Michigan has conducted this "business. She has assumed rights that all agree are not well-founded, "and the consequence is that she stands in an embarrassing posture. "*She claimed to be a State before she could be one.* She has acted "as such without authority. She has elected Senators when our Con- "stitution provides that they shall be elected by the legislature of the "STATES, and by no other authority. *She had no such legislature.* "She has elected a Representative, when the Constitution of the United "States allows none but the *people of States* to elect Representatives. "and none to vote for such a person except those who are qualified to "vote for the most numerous branch of the State legislature. If she "claim rights under this Constitution, as she does when she claims to "be represented here, then she must be not only a State, but *one of* "*the States of this Union*, over which the Constitution spreads itself; "*but we all agree she is not*, or we should not be making provisions "by law for her admission." [App. to Cong. Globe, id,, 558.]

Senator Richard H. Bayard of Delaware, on the bill for the admis- sion of Michigan, said:

"By passing this bill the Senate would be sanctioning the most ob- "noxious principle, and would inflict a vital injury on the cause of free "dom. He argued that, according to the provisions of the ordinance "of 1787, which regulates the disposition of the territory northwest of "the Ohio and east of the Mississippi, *Michigan had no right to form* "*a constitution at all without the leave of Congress.*" [App. to Cong. Globe, 1836–7, p. 80.]

Senator Niles of Connecticut remarked:

"Who is willing to be responsible for an act operating on a whole "people, with their passions excited and inflamed, and calculated to "rekindle the extinguished flames, and to produce evils worse than the "border war which has happily subsided?" [Id., p. 311.]

In the House, Mr. Vinton of Ohio said:

"In all other cases, except that of Tennessee, which stood upon

"peculiar circumstances, the admission had been upon a law of Con-
"gress previously passed, prescribing the boundaries of the country and
"directing the manner in which the convention should be elected; pre-
"scribing, in short, all the details preparatory to the admission, so that,
"when the Constitution came back to Congress, in pursuance of the
"law, nothing remained to be done but to see that the requisites of the
"law had been complied with."

In the Senate, Thomas H. Benton said:

"He held that the people of that Territory (Michigan) might meet
"as often as they pleased, might take up the map, and drawing a dia-
"gram representing any boundaries they pleased, adopt these bounda-
"ries in their Constitution. and send the whole to Congress, and all this
"would be an innocent operation. It would be innocent, because
"Congress might act on it or not act on it, as it thought proper; they
"might agree to the Constitution or not agree to it, and the whole
"would be innocent, for it would be nothing more than a proposition
"for the acceptance of Congress."

James Buchanan of Pennsylvania, although, like Mr. Benton, advo-cating the admission of Michigan and the slave State of Arkansas coupled with it, made some important declarations. He distinctly stated his candid views to be the following:

"He thought it would have been better had a previous law been
"enacted by Congress, authorizing the formation of a Constitution by
"the people of the Territory."

"And in another speech in the Senate he said:

"*He admitted that the passage of such an act* PREVIOUSLY *to the*
"*admission of a new State* WAS THE BEST COURSE TO ADOPT."

And further:

"It is wise, I admit, for Congress, in the first instance, to pass such an act." (An enabling act.)

And in referring to the new Territory of Wisconsin, just in the process of being established, [see act of April 20, 1836], he remarked as follows:

"It will be the last of the five States into which the Northwestern
"Territory can be divided under the terms of the ordinance. * * *
"Still, *I should not advise them* (the people of Wisconsin) to frame a
"Constitution without a previous act of Congress."

This was the sound advice which the good people of Wisconsin afterwards so wisely followed; as it was, also, the course which the other three States had previously pursued.

It is well worth while to fully examine these discussions in order to see the contrariety of views entertained, and the inconsistencies of some of the arguments. Mr. Buchanan and Mr. Benton, in charge of the

bills in the Senate, it is no harsh criticism to say, were naturally enough solicitous for the admission of two Democratic States, and to this end they devoted themselves with all their ardor and ability. But to insure success in the Senate as then composed, the question, they saw, must be lifted above the level of party lines, and should be made one of peace, harmony and compromise. Regardless of the "irreversible line" of the ordinance, Mr. Buchanan said, in the debate of April 1, 1836, that "*It was his opinion that Ohio ought to have this territory*, and that "it was her interest that the question should be finally and immediately "settled, He would, however, undertake to predict that if they refused "to admit Michigan into the Union, after depriving her of this terri-"tory, they would do much to make the contest between her and Ohio "*one of blood instead of words*, and thus the feelings and sympathies of "the people would be excited in favor of the weak against the strong. * * "*He thought that the interests of all required that this entire ques* "*tion should be settled and finally put to rest.*"

This was also the tenor of Mr. Benton's arguments throughout the controversy, and Mr. King of Alabama added, on another occasion, that—

"This squabble between Michigan and Ohio about a few acres of "ground, *might set the whole Union into a blaze, and possibly cost* "*the government millions of dollars to put it down.*"

Again said Mr. Buchanan in the same speech:

"He might view this subject with a partial eye, but he was sure he "had as strong a regard both for Ohio and Indiana as for Michigan; "and he most solemnly believed that the very best interests of these "three great States required that the question of boundary should be "settled in the way that the bill proposed. * * Did any man believe "that the people of that *Territory* thought that this eastern and west-"ern line, running through the southern bend of Lake Michigan *was* "*not an irrevocable line? He himself was of a different opinion.*"

In his speech of April 1, 1836, Mr. Buchanan said, as follows:

"Ought we on this account to defer the final settlement of the "disputed boundary between Ohio and Michigan, and thus again give "rise to anarchy and confusion, and perhaps to the shedding of blood? "* * We must all desire to see this unfortunate boundary question "settled; and the passage of *this bill presents the best, if not the only* "*means*, of accomplishing a result so desirable. * * YOU MAY "HAVE CIVIL WAR AS THE DIRECT CONSEQUENCE OF YOUR VOTE THIS DAY. "Should the amendment of the Senator from Ohio [Mr. Ewing] prevail, "whilst it will leave unsettled the question of boundary, so important "to his own State, it may, and *probably will, produce scenes of blood-*"*shed and civil war along the boundary line.* I have expressed the "opinion that *Congress possesses the power* of annexing the territory in "dispute to the State of Ohio, and that it is expedient to exercise it. The

"only mode of extorting a reluctant consent from the people of Michigan "to this disposition, is to make it *a condition of their admission*, under "the present Constitution, into the Union, This bill proposes to do "so, and, in my humble judgment, Ohio is deeply interested in its pas- "sage." [App. to Cong. Globe, 1835–6, p. 389; also id., p. 309; also App. for 1836–7, p. 149. See speech of Senator Ewing, App. 1835–6, p. 275.]

Such were the arguments, motives and causes which led to the passage of the conditional law for the admission of Michigan. While its title is (we repeat) "An act to establish the northern boundary line of "the State of Ohio, and to provide for the admission of the State "of Michigan into the Union, upon the conditions therein ex- "pressed," yet it likewise establishes the northern boundary of the State of Indiana, as that line was described by the act of April 19, 1816. It was a remarkable compromise and compact of peace, demanded by extraordinary interests and exigencies. The case was, and must forever remain, unparalleled. It began by re-establishing the northern boundary line of Illinois, as by the act creating the Territory of Wisconsin. With the interests of Illinois satisfied, the claims of Indiana and of Ohio were adjusted to their entire satisfaction, with the exception of Senator Ewing of Ohio, who opposed the measure to the last. To Michigan was given the Upper Peninsula, but she could not gain admission until a convention of delegates, elected by her people, should give their assent to the boundaries prescribed, thus ignoring all the pretensions of her Legislature to act in the matter. No Representative or Senators were to act in Congress for her until after regular and complete admission into the Union. Arkansas was admitted without conditions and could cast her electoral vote in the pending Presidential contest. Not so with Michigan, unless she could hasten the proposed convention of delegates and gain, in proper time, the required assent; in which event the President was commanded to proclaim her a State of the Union, without any further action by Congress. The compact of the ordinance was to continue to be disregarded, and to be treated as having no binding force or effect whatever, in regard to the line, which, by it, had been declared forever unalterable. This amalgamated act of June 15, 1836, was not to be considered as forming any precedent, for Mr. Buchanan himself asserted that, "as to its importance as a precedent, we shall probably "never hear of it again, after the admission of Michigan into the Union."

And yet, after all persuasions, and entreaties, and appeals to the various interests, this conditional law passed the Senate by a close vote. The real strength of its advocates, as shown by the preliminary voting, was 24 to 20. On its final passage, in the absence of Messrs. Clay, Clayton and Crittenden, the vote stood 24 to 17. But at these figures

it would have been defeated but for the votes of the four senators from Illinois and Indiana, not to speak of the affirmative vote of Mr. Morris of Ohio. These five votes the other way, and the result would have been 19 for the bill and 22 against it. Counting the three absent Senators, 19 to 25.

But as if the act creating the Territory of Wisconsin, and the one relating to the admission of Michigan, were insufficient to settle the great question of the boundaries, or might not be absolutely conclusive, Congress made another law, a few days later, reaffirming and re-establishing the northern boundaries of Ohio, Indiana and Illinois. [Act of June 23, 1836.]

Shortly afterwards steps were taken for holding the required convention. The legislature was convened for that purpose, although it had no authority to act in the premises, either from Congress or by the terms of that Constitution under which it professed to act. It provided the details for the election of delegates and for their assemblage, by an act passed on July 25th, 1836. The convention met at Ann Arbor on September 26th, and refused to give its assent to the fundamental condition prescribed by Congress, and rejected the same. This stubborn refusal postponed all further proceedings until after the Presidential election and the meeting of Congress. The conditional act of Congress called for and legalized "a convention of delegates elected by the people;" but, strangely enough, it omitted to prescribe any mode or means by which the convention should be ordered or made up, or the time when, or the manner in which it should be chosen. In this strait, without further authority than that of the act itself, which plainly authorized the election of delegates, the people proceeded, on the 5th and 6th of December, to hold such elections. The delegates then elected assembled in convention on the 14th of December, and on the following day the assent of that body to the fundamental condition was formally given. These proceedings were transmitted to the President who, on Dec. 27th laid them before Congress by special message. Two days later a bill was reported in the Senate for the admission of Michigan into the Union upon an equal footing with the original States, which did not become a law until January 26, 1837.

From this review of the historical facts which brought about the conditional enactment of June 15, 1836, who can pretend to say that this law was the result of any mere right derived from the compact of 1787? Or that it was the result of any inherent or inalienable right existing in the people of that Territory, which could defy and override the discretionary power to admit new States, which the Constitution has

reposed in Congress? A student of history or of law cannot say so. The reasons for this peculiar law of June, 1836, do not and cannot now exist in the case of Dakota. The Ordinance is *functus officio;* it has performed its duty and its object. Its subject matter ceased when the five States provided for in it were admitted, and when the territory lying between the St. Croix and Mississippi rivers was awarded to and embraced within the limits of Minnesota.

Its bill of rights was absorbed and supplanted by the Constitution; and whatever of good was in it has been revivified or improved upon by our organic law. The northwest territory, ceded by Virginia, is a thing of the past. Its primordial institutions having performed their functions have long ago yielded to the new order of things under the principles of American constitutional law. Dakota is a thing of the present; and never having been a party or privy to the ordinance, or to the cession on which it was founded, she cannot claim any covenant running with that land. She came to the government years after the decease of the Confederacy, and years after the birth of the Constitution. She can claim nothing, and is bound by nothing enacted by the one body of which alone the Confederate Congress was composed. Dakota came to us from France, and there is nothing in the treaty by which she was conveyed which conflicts with the Constitution, or gives her any higher right than is expressed in that instrument. By it she is governed, and must continue to be governed, until Congress, in the exercise of its discretionary power, shall otherwise prescribe; for this is the will of the people of the United States who ordained and established the Constitution.

Indeed, the Supreme Court of the United States decided in 1850 that the Ordinance of 1787 ceased to be in force upon the adoption of the Constitution. The Chief Justice then said that "it is impossible to "look at the six articles which are supposed, in the argument, to be "still in force (and are said to be perpetual as a compact], without see-"ing at once that many of the provisions contained in them are incon-"sistent with the present Constitution." [Strader vs. Graham, 10 How., 95.]

And the act of March 2, 1861, providing, for the first time, a temporary government for the Territory of Dakota, contains nothing, either in words or by implication, which continues or extends the Ordinance over the Territory thus established. From this organic law it cannot be assumed that the inhabitants of Dakota have any absolute right to become a State whenever the population amounts to 60,000. Much less can it be assumed that whenever any portion of it contains 60,000 inhabitants or more, that particular portion has a right to define its own

boundaries and to demand statehood. The dimensions of any Territory are at the will of Congress; as, for example, in the case of Michigan, and quite recently in the case of Dakota. A large and fertile slice of our Territory has, within a few years, been granted to the State of Nebraska.

In fact, when Dakota was made a Territory, its settlement was hardly begun; and the people who have been filling its vast domain began to come nearly seventy years after the adoption of the Constitution. They migrated hither not upon the fancied strength of anything contained in the Ordinance (of which in reality they knew nothing), but under the belief that in due and proper time, and under the forms prescribed by the Constitution itself, they would finally be admitted into the Union. They knew that the people of the United States, by their organic law, had left the matter of admission to their Representatives in Congress, and to no other authority or power.

Numerous other citations from the debates might be given in support of these positions, were not this article already so lengthy. We come, however, to a close by two further quotations from James Buchanan, who was an able jurist and a well-known advocate of State rights. While he was in favor of the admission of Michigan for the reasons as above expressed by himself, yet he firmly maintained the following principles:

On January 2, 1837, in the debate on the bill for the admission of Michigan, James Buchanan said, in reference to the alleged right of Michigan, under the Ordinance of 1787, to become a State, and to be declared such by Congress, as follows:

"Mr. Buchanan here said that as one of the majority (voting for the "conditional act of June 15, 1836, the position HE TOOK AND MAIN-"TAINED with all the ability in his power was, that UNDER THE ORDI-"NANCE OF 1787, Congress having first fixed the boundaries of the State, "(and even if Michigan contained the population prescribed by the "Ordinance) SHE NEVERTHELESS HAD NO RIGHT TO COME IN UNDER THAT "ORDINANCE." [App. 1836–7, page 85.]

And again, on January 5th, 1837, he said, in reply to the proposition that a Territory, after it had adopted a Constitution in pursuance of an enabling act, would rise up at once into the rank of a sovereign and independent State—as follows:

"Did gentlemen intend to push their doctrine of State rights to "such an extreme, and thus enable every Territory to rise up into a "foreign State, and put Congress and the Union at defiance? *If this "doctrine be not REVOLUTIONARY* with a vengeance, he did not

"know what could be so called. No, sir; our territories belong to us. "They are integral parts of the nation. We authorize their people to "erect themselves into States, subject to our approbation; but, until "they actually enter the Union, they continue in a subordinate con "dition, and are subject to our control." [App. 1836–7, page 149.]

And so it was with Michigan after the passage of the conditional act of June 15, 1836, and before the act of January 26, 1837, admitting her into the Union. In that condition she was no more a State than she had been before. For, under the American system, it is impossible to conceive of the existence of a State in country ceded to the United States, until after regular and complete admission into the Union by virtue of an act of Congress.